Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-58-1994
NH CHAN, MAHADEV SHANKAR AND ZAKARIA YATIM JJCA
2 APRIL 1996

Civil Procedure *— Judgment — Grounds of judgment — Written judgment delivered — Judge supplied further grounds of judgment when appeal to higher court was filed — Whether undesirable*

Civil Procedure *— Res judicata — Application for leave to apply for certiorari — High Court refused application — Applicant appealed to Supreme Court — Supreme Court reversed High Court's decision — Leave granted — Supreme Court ordered that substantive motion be heard by another judge — Supreme Court did not give reason for reversing decision — Respondent raised same issue again before second judge — Whether matter res judicata — Whether respondent permitted to reopen issue*

Administrative Law *— Judicial remedies — Judicial review — Application for leave to apply for judicial review of council's decision — Whether judge should take into account of alternative remedies available to applicant — Whether leave could be granted if Parliament already provided for appeal procedure*

Administrative Law *— Judicial remedies — Judicial review — Application for leave to apply for judicial review of council's decision — Parliament already provided for appeal procedure — Whether judicial review could still be granted in very exceptional circumstances — What constituted 'very exceptional circumstances'*

Administrative Law *— Remedies — Certiorari — Application for extension of planning permission by developer — Local authority imposed additional condition that 30% of houses must be sold below RM25,000 per unit — Allegation by council that condition was required by 'Guidelines for low-cost flats' which stipulated that the houses must be 'more or less RM25,000' — Local authority knew developer was selling at higher prices before granting permission — Permission was first granted without incorporating such condition — Whether local authority estopped from imposing such condition — Whether had acted fairly — Whether error of law committed — Whether local authority's decision liable to be quashed — Town and Country Planning Act 1976 s 22(3), (6) & 24(5)*

Administrative Law *— Remedies — Certiorari — Allegation of bias — Application for extension of planning permission by developer — Municipal councillor told developer that he could jam project if he wanted to — Negotiate with developer on behalf of relative who was squatter on land — Insisted that relative be given flat free of charge — Councillor sat in council meetings — No declaration of interest — Council decided to impose additional condition that 30% of houses must be sold below RM25,000 per unit — Whether reasonable people might infer that councillor was biased — Whether council's decision liable to be quashed — Local Government Act 1976 s 34(5)*

Administrative Law *— Exercise of administrative powers — Local authority — Whether an administrative act could be partially good and partially bad — Whether court could quash the part which was bad only*

Civil Procedure *— Time — Additional power of court to enlarge and abrige time — Courts of Judicature Act 1964 Schedule art 8*

Civil Procedure *— Leave to appeal — Application for leave to apply for judicial review— Trial judge refused application on ground that alternative remedy by way of appeal existed — Whether correct to decide once and for all at leave stage whether availability of domestic remedy excluded judicial review — Whether judge should take into account of alternative remedy in giving or refusing leave*

Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd ('the appellant') was a co-operative society registered under the Co-operative Societies Act 1948. The appellant owned a piece of land in Pulau Pinang ('the land'), and they wanted to construct a block of 10-storey low-cost flats to be sold to the appellant's members or their dependants. The appellant engaged an architect to process the necessary documentation and plans, and an application for planning permission had been submitted to Majlis Perbandaran Pulau Pinang ('the respondent'). On 21 April 1990, the appellant entered into a joint venture agreement ('the agreement') with a developer. It was stipulated in the agreement that the selling price of a two-bedroom flat should not exceed RM32,000 and a three-bedroom flat should not exceed RM45,000, and that the developer was to develop and manage the project. By a letter dated 18 June 1991, the respondent informed the appellant that it was required to amend its plans within two months to take into account the requirements of the 'Guidelines for low-cost flats' ('the guidelines'), inter alia, that 30% of the low-cost houses have to be built and sold at a price not exceeding RM25,000 per unit ('the requirement'). However, the appellant objected to the requirement through a letter dated 13 August 1991. By a letter dated 7 September 1991, the respondent informed the appellant that the planning permission had been granted on 6 September 1991. The planning permission listed out a few conditions, but no reference was made to the requirement. On 14 December 1991, the appellant and the developer entered into a supplemental agreement to raise the selling price of the two-bedroom units to RM38,000 and the three-bedroom units to RM62,000. This was objected by some of the appellant's members who accordingly sent a joint petition to the respondent. Through a letter dated 24 February 1992, the respondent informed the appellant that the building plan was approved and that it did not have the authority to deal with the matter contained in the joint petition. The appellant

A and the developers then went ahead to sell the flats at the new prices. However, the developer was not able to start building work on the land because of a private caveat and squatters on the land. One of the squatters, Rabeah bte Abu Bakar ('Rabeah'), had told the appellant's secretary that her uncle by the name of Ahmad Miftah Khan ('Khan') B was a member of the respondent council, and that all negotiations should be done by him. Meanwhile, the appellant's architect had on 2 September 1992 applied to the respondent for a first extension of the planning permission which was due to expire on 5 September 1992. By a letter dated 30 July 1993, the respondent told the appellant that it had agreed to grant the extension from 6 September 1992 to C 5 September 1993, subject to inter alia, the additional condition that the completion of 30% low-cost at RM25,000 per unit ('the additional condition'). The appellant appealed to the respondent regarding the additional condition. The appeal was rejected on 20 September 1993. Meanwhile, the first extension had expired on 5 September D 1993, and the appellant applied for a second extension. Whilst the appellant's request for an extension was still pending, the appellant acted on Rabeah's assertion that she would only negotiate the terms of vacating her premises through her uncle. On 15 June 1993, the appellant held a committee meeting which Rabeah attended with E Khan. The appellant's secretary alleged that Khan disclosed that he was a municipal councillor who could jam the project if he wanted to, and insisted that Rabeah should be given one two-bedroom flat free. On 1 September 1993, the appellant's secretary sent Rabeah an agreement which had already been executed by the appellant. However, Rabeah said that Khan had advised her not to sign the F agreement as he was going to recommend additional conditions to the approved plan. On 11 October 1993, the appellant filed an ex parte application for leave to apply for certiorari to quash the respondent's decision made on 20 September 1993, on the ground that it was against natural justice, ultra vires, unreasonable, irrational G and mala fides. The trial judge dismissed the application on the ground that the appellant's failure to appeal was fatal pursuant to *Government of Malaysia & Anor* v *Jagdis Singh* [1987] 2 MLJ 185, as s 23 of the Town and Country Planning Act 1976 ('the Act') had provided an alternative remedy by way of an appeal. The trial judge H added that even though the decision in *Jagdis Singh* was concerned with the disposal of the substantive motion, the position was the same at the application for leave stage. The appellant appealed to the Supreme Court, which ordered that the trial judge's decision be set aside, that the appellant be granted leave to apply for certiorari, and that the substantive motion be heard by another judge ('the second I judge'). The second judge dismissed the appellant's application on the sole ground that an alternative remedy existed. The appellant

appealed to the Court of Appeal. In the mean time, the second judge provided further grounds of judgment other than the failure to exhaust the domestic remedy in order to justify the rejection of the application. A

Held, allowing the appeal:

(1) Supplementary grounds after a written judgment has been delivered may well affect judicial credibility because they could easily be mistaken for the wisdom of hindsight rather than representing the actual decision-making process. Consequently, it is undesirable to have two written judgments in the same case. However, this finding should not cause any injustice to the parties, since this appeal was by way of rehearing and the court must tackle afresh all the issues raised in the court below, including those the judge did not deal with (see p 724I). B C

(2) The Supreme Court in this case did not give its reasons for reversing the trial judge's decision, and the respondent was therefore permitted to reopen the issue (see p 725B). D

(3) The correct approach is to decide once and for all at the leave stage whether the availability of the domestic remedy excluded judicial review (see p 725E); *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717 followed. E

(4) However, it is well established that, in giving or refusing leave to apply for judicial review, account must be taken of alternative remedies available to the applicant. The jurisdiction would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances (see p 725F); *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] 1 All ER 257; [1986] 2 WLR 144 followed. F

(5) Where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided. If the appellant can do so, leave must be given and the court must then proceed to consider all the substantial grounds advanced in the substantive motion (see p 725H). G

(6) If the Supreme Court thought that the availability of the alternative remedy was fatal, it would not have allowed the appeal. The order of the Supreme Court did not contain the word 'merits'. It required consideration of all the issues raised in the substantive motion. An application on the merits is one which depends on the inherent justice of the appellant's contention. It turns on the substantial facts of the case as distinguished from technical objections or collateral matter. It was regrettable that having directed himself that the judgment H I

of the Supreme Court required him to deal with 'the entire merits of the application', the judge disposed of the appeal not on the entire merits, but on what was in effect a technicality which was no longer open for consideration (see p 727G–I).

(7) Judicial experience in the past three decades has increasingly brought about a realization that the manner in which a discretion should be exercised cannot easily be pigeonholed into judicial precedent. The factual circumstances giving entitlement to relief are too varied to permit standardization. The prescription 'judicial review will only be exercised in very exceptional cases' has been proven to be a high sounding formula which is incapable of precise application (see p 728E–F).

(8) Whether a grievance should be redressed only by way of appeal, or by way of judicial review regardless of a domestic remedy being available, must turn on whether the complaint is one of 'abuse of power'. This court used this term in its widest sense and equate it to 'an error of law' as that term is used today to include, inter alia, a denial of a legitimate expectation, a breach of natural justice or a making of a decision which is irrational and unjust. Such a situation would be 'exceptional or very exceptional' because the objective of the decision-making process is to make lawful decisions within the ambit of the statutory powers conferred (see 728G–H).

(9) The availability of an alternative domestic remedy will not shut out an application for judicial review where the complaint made to the court is one of 'error of law' or 'abuse of power' going to the legality of the conduct of the inferior tribunal or other decision-making authority, unless the alternative domestic remedy was intended for and in fact constitutes a wholly adequate machinery for the just disposal of the complaint in question (see p 730H–I).

(10) Furthermore, the respondent's decision on 20 September 1993 was not made under s 22(3) read with s 24(5) of the Act and was therefore not an appealable matter under s 23. Thus, the appellant had no domestic remedy left and judicial review was the only way to go (see p 731A–C).

(11) The guidelines clearly permit some flexibility in the cost of low-cost flats ['lebih kurang RM25,000']. Against this backdrop, the requirements of the respondent's list of 18 June 1991 could not be treated as non-negotiable (see p 735B).

(12) The respondent knew on 6 September 1991 that the proposed price was RM32,000 and RM45,000, that the appellant did not agree to the requirement, and that the prices were a private internal arrangement between the members of a co-operative

and the developer. Despite this, the respondent did *not* make it a condition then that 30% of the flats approved should be sold at a cost not exceeding RM25,000. The wording of s 22(3) of the Act makes it clear that to amount to a condition, it must be so incorporated as to make the planning permission granted subject to such condition, and that such condition must appear in the prescribed form (s 22(6)) (see p 735E–H).

(13) It was once thought that a legitimate expectation consisted only of an aggrieved person's right to be heard before a decision was taken which was adverse to his interests. But the law has come very much further than that. The planning permission granted the appellant a substantive right. The respondent's council's decision of 14 February 1992 was a clear unambiguous representation that the appellant was not pegged to selling its units at prices not exceeding RM25,000. The appellant relied on the representation, and in accordance with its internal procedures, fixed the new prices at which the units would be sold and proceeded to sell them. Since the respondent was fully aware of these prices and had stated a council's decision that the prices were an internal matter for the appellant, the respondent was not entitled to change its decision so as to adversely affect the claimant. There was an estoppel here. Further, the respondent should have given advance notice of its intention to impose the additional condition because the rules of natural justice demanded it. Also, it could not be said that the respondent acted fairly in this case because the decision-making process was shown to be fatally flawed by the reasons which the respondent's planning director subsequently advanced to justify the imposition of the additional condition (see pp 736E and 738D–H); *R v Devon County Council, ex p Baker & Anor* [1995] 1 All ER 73 followed.

(14) Whilst the intentions of the respondent in seeking to make available to the public low-cost flats at RM25,000 is quite laudable, this was not the right way to go about it. Pursuant to s 24(5), in granting an extension, the local planning authority may impose such conditions on the planning permission as it thinks fit. The words 'as it thinks fit' in planning legislation cannot be given their literal meaning so that the planning authority can do as it pleases. The conditions, to be valid, must fairly and reasonably relate to the permitted development. On the facts, this court was constrained to hold that in imposing the additional condition, the respondent committed an error of law, and that manner in which the respondent went about it constituted an abuse of powers (see p 740B, G); *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Anor* [1958] 1 QB 554 followed.

(15) What the court was concerned with here was not whether there was actual bias on the part of Khan, but whether even if Khan was as impartial as could be, right minded persons would think there was a real likelihood of bias on his part (see p 743H); *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1968] 3 All ER 304 and *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 followed.

(16) Khan sat at a sub-committee meeting on 5 and 20 September 1993 rejecting the appellant's appeals. Reasonable people might well think it a proper inference from these facts that Khan was biased. It was the opinion of this court that in the first place, Khan should never have participated in the negotiations on behalf of Rabeah. He cannot be equated to a split personality who is only an interested uncle when talking to the appellant on her behalf and a disinterested councillor when participating in the council meetings. Once he took on the role of Rabeah's champion he should not have sat at the meeting on 20 July or 5 September or 20 September 1993. At the very least, he should have declared his interest as required by s 34(5) of the Local Government Act 1976 (see p 745C–F)

(17) An administrative act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing in this case, the additional condition was severable from the rest of the planning permission (see p 747D).

(18) But, merely quashing the additional condition will not answer the needs of justice in this case. Section 24(4) of the Act requires a planning permission extended under s 24(3) to remain valid for 12 months from the date of the extension thereof. In the court's view, the date of the extension was the date on which the permission was extended, and not the date on which previous permission lapsed. Therefore, the respondent also did wrong in making a retrospective order instead of extending the planning permission from 20 July 1993 to 19 July 1994 (see p 747E).

(19) Article 8 of the Schedule to the Courts of Judicature Act 1964 provides the courts with the additional power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until the the expiration of the time prescribed, provided that this provision shall be without prejudice to any written law in relation to limitation (see p 747G).

(20) The respondent committed an error of law in imposing the additional condition on 20 July 1993, and in failing to abrogate it on 20 September 1993. Accordingly, this court made an order in terms of the first prayer of the appellant's substantive motion, and ordered that the planning permission granted on 6 September 1991 was without the additional condition in the respondent's letter dated 30 July 1993 (ie the words, '(ii) Menyediakan 30% kos rendah atas harga RM25,000 seunit'), and that be and is hereby extended for one year from the date of the service on the respondent of the order extracted pursuant to this judgment (see pp 747H–I and 748A–B).

[Bahasa Malaysia summary

Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd ('perayu') adalah sebuah pertubuhan koperasi yang didaftarkan di bawah Akta Pertubuhan Koperasi 1948. Perayu memiliki sebidang tanah di Pulau Pinang ('tanah tersebut'), dan mereka hendak membina satu blok rumah pangsa kos rendah yang mengandungi sepuluh tingkat untuk dijual kepada ahli-ahli perayu atau tanggungan mereka. Perayu telah melantik seorang akitek untuk memproses dokumen-dokumen dan pelan-pelan yang perlu, dan suatu permohonan untuk kebenaran perancangan telah dikemukakan kepada Majlis Perbandaran Pulau Pinang ('penentang') pada kemudiannya. Pada 21 April 1990, perayu mengikat suatu perjanjian usahasama ('perjanjian tersebut') dengan suatu pemaju. Adalah ditetapkan dalam perjanjian tersebut bahawa harga jualan rumah pangsa dua bilik tidak boleh melebihi RM32,000 dan rumah pangsa tiga bilik tidak boleh melebihi RM45,000, dan bahawa pemaju hendaklah memaju dan menguruskan projek itu. Melalui surat bertarikh 18 Jun 1991, penentang memberitahu perayu bahawa ia perlu meminda pelan bangunannya dalam masa dua bulan untuk mengambil kira kehendak-kehendak 'Garispanduan-garispanduan untuk rumah pangsa kos rendah' ('garispanduan tersebut'), antara lain, bahawa 30% daripada rumah kos rendah itu hendaklah dibina dan dijual pada harga tidak melebihi RM25,000 seunit ('kehendak tersebut'). Pada 13 Ogos 1991, perayu membantah terhadap kehendak tersebut. Melalui surat bertarikh 7 September 1991, penentang memberitahu perayu bahawa kebenaran perancangan telah diberikan pada 6 September 1991. Kebenaran perancangan itu menyatakan beberapa syarat, tetapi langsung tidak terdapat rujukan kepada kehendak tersebut. Pada 14 Disember 1991, perayu dan pemaju mengikat satu perjanjian tambahan untuk menaikkan harga jualan unit dua bilik kepada RM38,000 dan unit tiga bilik kepada RM62,000. Ini telah dibantah oleh beberapa orang ahli perayu yang kemudiannya

telah menghantar petisyen bersama kepada penentang. Melalui surat bertarikh 24 Februari 1992, penentang memberitahu perayu bahawa pelan bangunan telahpun diluluskan dan penentang menyatakan bahawa ia tidak mempunyai kuasa untuk menyelesaikan perkara yang terkandung dalam petisyen bersama itu. Perayu dan pemaju selepas itu pun menjual rumah pangsa itu pada harga yang baru. Walau bagaimanapun, pemaju tidak dapat memulakan kerja-kerja pembinaan kerana terdapat kaveat persendirian dan setinggan di tanah tersebut. Seorang daripada setinggan itu, Rabeah bte Abu Bakar ('Rabeah'), telah memberitahu setiausaha kepada perayu bahawa bapa saudaranya yang bernama Ahmad Miftah Khan ('Khan') merupakan seorang ahli majlis perbandaran, dan bahawa semua perundingan hendaklah dibuat olehnya. Sementara itu, akitek perayu telah pada 2 September 1992 memohon kepada penentang untuk pelanjutan pertama kebenaran perancangan yang akan tamat pada 5 September 1992. Melalui surat bertarikh 30 Julai 1993, penentang memberitahu perayu bahawa ia telah bersetuju untuk membenarkan pelanjutan itu daripada 6 September 1992 hingga 5 September 1993, tertakluk kepada antara lain, syarat tambahan penyempurnaan 30% rumah pangsa kos rendah pada harga RM25,000 satu unit ('syarat tambahan'). Perayu membuat rayuan kepada penentang berkenaan dengan syarat tambahan itu. Rayuan itu telah ditolak pada 20 September 1993. Sementara itu, pelanjutan pertama telah tamat pada 5 September 1993, dan perayu memohon untuk pelanjutan kedua. Semasa permohonan perayu untuk pelanjutan masih dalam pertimbangan, perayu telah bertindak di atas desakan Rabeah bahawa beliau hanya akan berunding mengenai syarat-syarat untuk mengosongkan premisnya melalui bapa saudaranya. Pada 15 Jun 1993, perayu telah mengadakan mesyuarat jawatankuasa yang Rabeah hadir bersama-sama dengan Khan. Setiausaha kepada perayu mendakwa bahawa Khan telah memberitahunya bahawa dia merupakan ahli majlis perbandaran yang boleh menghentikan projek itu jika dia mahu, dan mendesak supaya Rabeah diberikan satu rumah pangsa dua bilik dengan percuma. Pada 1 September 1993, setiausaha kepada perayu telah menghantar satu perjanjian kepada Rabeah yang telahpun disempurnakan oleh perayu. Walau bagaimanapun, Rabeah menyatakan bahawa Khan telah menasihatkannya supaya tidak menandatangani perjanjian tersebut kerana dia sedang mengesyorkan syarat-syarat tambahan ke atas pelan yang telah diluluskan itu. Pada 11 Oktober 1993, perayu telah memfailkan permohonan ex parte untuk kebenaran bagi memohon certiorari untuk membatalkan keputusan penentang yang dibuat pada 20 September, atas alasan bahawa ia adalah bertentangan dengan keadilan asasi, ultra vires, tidak munasabah, tidak rasional dan mala fide. Hakim perbicaraan menolak permohonan tersebut atas alasan

bahawa kegagalan untuk merayu adalah membawa padah menurut kes *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, kerana s 23 Akta Perancangan Bandar dan Desa 1976 ('Akta tersebut') telah menyediakan remedi alternatif secara rayuan. Hakim perbicaraan juga menambah bahawa walaupun keputusan dalam *Jagdis Singh* adalah berkenaan dengan penolakan usul substantif, keadaannya sama pada peringkat permohonan untuk kebenaran. Perayu membuat rayuan ke Mahkamah Agung, yang memerintahkan supaya keputusan hakim perbicaraan diketepikan, bahawa perayu diberikan kebenaran untuk memohon certiorari, dan bahawa usul substantif didengar di hadapan hakim yang lain ('hakim kedua'). Hakim kedua menolak permohonan perayu atas alasan tunggal bahawa remedi alternatif wujud. Perayu membuat rayuan ke Mahkamah Rayuan. Sementara itu, hakim kedua telah memberikan alasan penghakiman selanjutnya, selain daripada kegagalan untuk menggunakan remedi domestik, untuk menyokong penolakan permohonan itu.

Diputuskan, membenarkan rayuan:

(1) Alasan tambahan selepas suatu penghakiman bertulis disampaikan mungkin boleh mempengaruhi kebolehpercayaan kehakiman sebab alasan tersebut dengan mudahnya boleh disalah anggap sebagai kebijaksanaan pengalaman yang lalu, dan bukan sebagai mewakili proses membuat keputusan yang sebenar. Ekoran itu, kewujudan dua penghakiman bertulis dalam kes yang sama adalah tidak diingini. Walau bagaimanapun, pendapat ini tidak harus mengakibatkan ketidakadilan kepada pihak-pihak, oleh kerana rayuan ini adalah menerusi pembicaraan semula dan mahkamah harus mempertimbangkan sekali lagi semua isu yang telah ditimbulkan di mahkamah bawahan, termasuk isu-isu yang tidak dibicarakan oleh hakim (lihat ms 724I).

(2) Mahkamah Agung dalam kes ini tidak memberi alasannya apabila ia mengakas keputusan hakim perbicaraan, dan dengan itu penentang dibenarkan untuk membuka semula isu (lihat ms 725B).

(3) Pendekatan yang betul ialah dengan menentukan secara sekaligus pada tahap kebenaran sama ada atau tidak terdapat remedi domestik yang menidakkan kajian semula kehakiman (lihat ms 725E); *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717 diikut.

(4) Namun demikian, adalah mantap bahawa dalam memberikan atau menolak kebenaran untuk memohon kajian semula kehakiman, remedi alternatif yang ada kepada pemohon

mestilah diambil kira. Bidang kuasa tidak akan dilaksanakan jika terdapat suatu remedi alternatif melalui rayuan, kecuali dalam keadaan-keadaan yang luar biasa (lihat ms 725F); *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] 1 All ER 257 dan [1986] 2 WLR 144 diikut.

(5) Jika Parlimen telah memperuntukkan suatu prosedur rayuan, kajian semula kehakiman tidak terpakai melainkan jika perayu boleh membezakan kesnya daripada jenis kes di mana prosedur rayuan diperuntukkan. Jika perayu boleh berbuat demikian, kebenaran mesti diberikan dan mahkamah mestilah terus mempertimbangkan semua alasan asas yang dikemukakan dalam usul substantif (lihat ms 725H).

(6) Jikalau Mahkamah Agung berpendapat bahawa kewujudan remedi alternatif membawa padah, ia tidak akan membenarkan rayuan itu. Perintah Mahkamah Agung tidak mengandungi perkataan 'merit'. Ia memerlukan pertimbangan semua isu yang ditimbulkan dalam usul substantif. Suatu permohonan atas merit bergantung kepada keadilan sedia ada hujah perayu. Ia bergantung pada fakta penting kes dibezakan daripada bantahan teknikal atau perkara kolateral. Adalah patut disesali kerana selepas mengarahkan diri bahawa penghakiman Mahkamah Agung menghendaki beliau membicarakan 'kesemua merit permohonan', hakim yang berkenaan telah menolak rayuan bukan atas kesemua merit, tetapi atas apa yang pada hakikatnya suatu keteknikan yang tidak lagi terbuka untuk pertimbangan (lihat ms 726G–I).

(7) Pengalaman kehakiman dalam tiga dekad yang lalu membawa kesedaran yang semakin tinggi bahawa cara budi bicara harus dilaksanakan tidak boleh dikelaskan dengan mudahnya kepada duluan kehakiman. Terdapat terlalu banyak jenis keadaan faktual yang mewujudkan hak terhadap relief untuk membenarkan penstandardan. Preskripsi 'kajian semula kehakiman hanya akan dilaksanakan dalam keadaan amat luar biasa' telah dibuktikan sebagai rumusan yang muluk-muluk yang tidak dapat dipakai secara tepat (lihat ms 728E–F).

(8) Sama ada sesuatu kilanan harus dibetulkan hanya menerusi rayuan atau menerusi kajian semula kehakiman tanpa mempedulikan bahawa remedi domestik wujud, adalah bergantung kepada sama ada aduan adalah berkenaan dengan 'penyalahgunaan kuasa'. Mahkamah ini menggunakan terma ini dalam makna yang paling luas dan menyamakannya kepada 'kesilapan undang-undang' oleh kerana terma itu kini telah digunakan untuk merangkumi, antara lain, penafian jangkaan sah,

pelanggaran keadilan asasi atau pembuatan keputusan yang tidak rasional dan tidak adil. Keadaan sedemikian akan menjadi 'luar biasa atau amat luar biasa', kerana objektif proses membuat keputusan ialah untuk membuat keputusan yang sah dalam lingkungan kuasa statutori yang diberikan (lihat ms 728G–H).

(9) Kewujudan remedi domestik alternatif tidak akan menidakkan permohonan untuk kajian semula kehakiman di mana aduan yang dibuat kepada mahkamah membabitkan 'kesilapan undang-undang' atau 'penyalahgunaan kuasa' yang berhubung dengan kesahan kelakuan tribunal bawahan atau pihak berkuasa membuat keputusan yang lain, melainkan remedi domestik alternatif ditujukan untuk dan pada hakikatnya membentuk mekanisme yang mencukupi pada keseluruhannya bagi penyelesaian adil aduan yang berkenaan (lihat ms 730H–I).

(10) Tambahan pula, keputusan penentang pada 20 September 1993 tidak dibuat di bawah s 22(3) dibaca dengan s 24(5) Akta tersebut dan dengan itu, tidak merupakan perkara yang boleh dirayukan di bawah s 23. Justeru itu, perayu tidak mempunyai apa-apa lagi remedi domestik dan kajian semula kehakiman merupakan jalan tunggal (lihat ms 731A–C).

(11) Garis panduan jelas membenarkan kefleksibelan dalam kos rumah pangsa rendah-kos ['lebih kurang RM25,000']. Berdasarkan latar belakang ini, keperluan dalam senarai penentang bertarikh 18 Jun 1991 tidak boleh disifatkan sebagai tak boleh runding (lihat ms 735B).

(12) Penentang memang tahu pada 6 September 1991 bahawa harga yang dicadangkan adalah RM32,000 dan RM45,000, bahawa perayu tidak bersetuju kepada kehendak itu, dan bahawa harga-harga merupakan urusan dalaman persendirian antara ahli-ahli sebuah koperasi dan pemaju. Namun begitu, penentang *tidak* mensyaratkan pada ketika itu bahawa 30% rumah pangsa yang diluluskan harus dijual pada kos tidak melebihi RM25,000. Perkataan-perkataan dalam s 22(3) Akta tersebut telah menjelaskan bahawa supaya ia berjumlah kepada suatu syarat, ia mestilah dimasukkan supaya kebenaran perancangan diberikan tertakluk kepada syarat demikian, dan bahawa syarat demikian mesti muncul dalam bentuk yang ditetapkan (s 22(6)) (lihat ms 735E–H).

(13) Pada suatu masa dahulu, pernah difikirkan bahawa jangkaan sah hanya terdiri daripada hak pihak terkilan untuk didengar sebelum keputusan yang bertentangan dengan kepentingannya dibuat. Akan tetapi, undang-undang telah berkembang lebih jauh daripada itu. Kebenaran perancangan memberikan perayu

hak substantif. Keputusan majlis penentang bertarikh 14 Februari 1992 merupakan representasi yang jelas dan nyata bahawa perayu tidak disyaratkan untuk menjual unit-unit pada harga yang tidak melebihi RM25,000. Perayu telah bergantung pada representasi itu, dan menurut prosedur dalaman, telah menetap harga baru atas mana unit-unit akan dijual dan telah terus menjual unit-unit itu. Oleh kerana penentang betul-betul sedar akan harga-harga ini dan telah menyatakan keputusan sebagai sebuah majlis bahawa harga-harga adalah perkara dalaman bagi perayu, penentang tidak berhak menukar keputusannya supaya menjejaskan hak penuntut. Terdapat suatu estopel di sini. Selanjutnya, penentang sepatutnya memberi notis terlebih dahulu tentang tujuannya untuk mengenakan syarat tambahan, sebab rukun keadilan asasi menuntut supaya ia berbuat demikian. Lebih-lebih lagi, tidak boleh dikatakan bahawa penentang telah bertindak secara adil dalam kes ini kerana proses membuat keputusan yang berkenaan mempunyai kecacatan yang membawa padah atas sebab-sebab yang dikemukakan oleh pengarah perancangan pihak penentang pada kemudiannya bagi memberi justifikasi kepada pengenaan syarat tambahan (lihat ms 736E dan 738D–H); *R v Devon County Council, ex p Baker & Anor* [1995] 1 All ER 73 diikut.

(14) Walaupun tujuan penentang dalam menyediakan rumah pangsa kos-rendah kepada orang awam pada harga RM25,000 merupakan satu tindakan yang patut dipuji, ini bukanlah cara yang betul untuk membuatnya. Menurut s 24(5), dalam membenarkan pelanjutan, pihak berkuasa perancangan tempatan boleh mengenakan syarat ke atas kebenaran perancangan seperti yang difikirkannya patut. Perkataan-perkataan 'seperti yang difikirkannya patut' dalam perundangan perancangan tidak boleh diberikan makna harfiah supaya pihak berkuasa perancangan boleh membuat sesuka hati. Syarat-syarat itu mestilah mempunyai kaitan dengan pemajuan yang dibenarkan secara adil dan munasabah supaya syarat-syarat tersebut adalah sah. Atas fakta, mahkamah ini terpaksa membuat keputusan bahawa dalam mengenakan syarat tambahan, penentang telah melakukan kesilapan undang-undang, dan cara penentang melakukannya merupakan suatu penyalahgunaan kuasa (lihat ms 740B, G); *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Anor* [1958] 1 QB 554 diikut..

(15) Apa yang diambil berat oleh mahkamah di sini bukanlah sama ada benar-benar terdapat sikap berat sebelah pada pihak Khan atau tidak, tetapi sama ada, jikapun Khan betul-betul adil,

orang yang berfikiran wajar akan berpendapat bahawa besar kemungkinan terdapat sikap berat sebelah pada pihaknya (lihat ms 743H); *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1968] 3 All ER 304 dan *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 diikut.

(16) Khan telah menghadiri mesyuarat sub-jawatankuasa pada 5 dan 20 September 1993 yang menolak rayuan perayu. Orang yang munasabah mungkin akan membuat inferens daripada fakta-fakta ini bahawa Khan bersikap berat sebelah. Adalah merupakan pendapat mahkamah ini bahawa pertama sekali, Khan tidak patut menyertai perundingan bagi pihak Rabeah. Dia tidak boleh disamakan dengan personaliti bahagi dua yang merupakan semata-mata seorang bapa saudara yang berminat ketika bercakap dengan perayu bagi pihaknya dan seorang anggota majlis yang tidak berminat ketika menyertai mesyuarat majlis. Sebaik sahaja dia mengambil peranan sebagai pejuang Rabeah dia tidak patut menghadiri mesyuarat pada 20 Julai atau 5 September atau pun 20 September 1993. Sekurang-kurangnya, dia patut mengumumkan kepentingannya sebagai yang dikehendaki oleh s 34(5) Akta Kerajaan Tempatan 1976 (lihat ms 745C–F).

(17) Suatu tindakan pentadbiran mungkin adalah separuh baik dan separuh buruk. Seringkali, tribunal atau pihak berkuasa membuat perintah yang betul tetapi menambahkan arahan atau syarat yang melampaui kuasanya. Jika bahagian yang buruk boleh diasingkan daripada yang baik dengan seluruhnya, mahkamah akan membatalkan bahagian yang buruk sahaja dan membiarkan yang baik. Dalam kes ini, syarat tambahan boleh diasingkan daripada kebenaran perancangan yang lain (lihat ms 747D).

(18) Akan tetapi, membatalkan syarat tambahan semata-mata tidak akan memberi jawapan kepada keperluan keadilan dalam kes ini. Seksyen 24(4) Akta tersebut memerlukan supaya kebenaran perancangan yang dilanjutkan di bawah s 24(3) kekal menjadi sah selama 12 bulan dari tarikh pelanjutan itu. Pada pendapat mahkamah, tarikh pelanjutan adalah tarikh di mana kebenaran dilanjutkan, dan bukan tarikh atas mana kebenaran terdahulu telah luput. Oleh yang demikian, penentang juga telah melakukan kesalahan dalam membuat perintah secara kebelakangan, dan tidak melanjutkan kebenaran perancangan dari tarikh 20 Julai 1993 hingga 19 Julai 1994 (lihat ms 747E).

(19) Perkara 8 Jadual Akta Kehakiman 1964 memberikan mahkamah dengan kuasa tambahan untuk melanjutkan atau menyingkatkan masa yang disyaratkan melalui apa-apa undang-

undang bertulis bagi melakukan apa-apa tindakan atau mengambil apa-apa prosiding, walaupun sebarang permohonan untuknya tidak dibuat sehingga tamatnya tempoh yang disyaratkan, denagan syarat peruntukan ini tidak menjejaskan mana-mana undang-undang bertulis berkaitan dengan pembatasan. (lihat ms 747G).

(20) Penentang telah melakukan kesilapan undang-undang dalam mengenakan syarat tambahan pada 20 Julai 1993, dan dalam kegagalan untuk membatalkannya pada 20 September 1993. Lantaran itu, mahkamah ini telah membuat perintah seperti yang dikehendaki atas permohonan pertama usul substantif perayu, dan memerintah bahawa kebenaran perancangan yang diberikan pada 6 September 1991 adalah tanpa syarat tambahan dalam surat penentang bertarikh 30 Julai 1993 (iaitu perkataan-perkataan, '(ii) Menyediakan 30% kos rendah atas harga RM25,000 seunit'), dan supaya kebenaran perancangan dilanjutkan selama setahun dari tarikh penyampaian perintah yang dikeluarkan menurut penghakiman ini ke atas penentang (lihat ms 747H–I dan 748A–B).]

[*Editorial Notes*: The respondent had appealed to the Federal Court vide Civil Appeal No 02–6–1996P.]

Notes

For cases on judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1824–2030.

For cases on exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1–50.

For cases on judicial remedies, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 83–95.

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission & Anor [1969] 2 AC 147

Ankur Nath Ganguli v PP [1956] 22 MLJ 206

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228

Badat bin Drani v Tan Kheat [1953] 19 MLJ 67

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352

Cheong Seok Leng v PP [1988] 2 MLJ 481

DPP v Hutchinson & Anor [1990] 2 All ER 836
Florence Bailes v Dr Ng Jit Leong [1983] 2 MLJ 175
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185
Hall & Co Ltd v Shoreham-By-Sea Urban District Council & Anor [1964] 1 All ER 1
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404
Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617
Lai Cheng Choeng v Sowaratnam [1983] 2 MLJ 113
Land Executive Committe of Federal Territory v Sykt Harper Gilfillan Bhd [1981] 1 MLJ 234
Loh Kwang Seong v PP [1960] 26 MLJ 271
Metropolitan Properties Co (FGC) Ltd v Lannon & Ors [1968] 3 All ER 304
Nathan v PP [1972] 2 MLJ 101
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657
PP v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166; [1980] 1 MLJ 117; [1980] 2 MLJ 276
Pyx Granite Co Ltd v Ministry of Housing and Local Government & Anor [1958] 1 QB 554
R v Amber Valley District Council, ex p Jackson [1984] 3 All ER 501
R v Devon Conty Council, ex p Baker & Anor [1995] 1 All ER 73
R v London Borough of Hillingdon, ex p Royco Homes Ltd [1974] 2 All ER 643
R v Secretary of State for the Home Department, ex p Swati [1986] 1 All ER 717
R v Sevenoaks District District Council, ex p Terry [1985] 3 All ER 226
R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd [1985] 3 All ER 234
South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors [1981] AC 363
Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317
The State (Abenglen Properties Ltd) v The Right Honourable The Mayor Aldermen and Burgesses of Dublin [1982] ILRM 590
Yap Liang Neo v Tan Yew Ghee & Anor [1936] MLJ (Rep) 113

Legislation referred to

Co-operative Societies Act 1948
Courts of Judicature Act 1964 s 94
Court Ordinance 1948 s 21(1)

Housing Developers (Control & Licensing) Act 1966 s 2(2)(a)
Housing Developers (Control & Licensing) Regulations 1989 regs 3(6), 5, 5(5)(a), 10, 11
Interpretation Act 1948 and 1967 s 61
Local Government Act 1976 ss 10, 28, 34(1), (5)
Planning Control (General) Rules 1990 r 10(1)
Rules of the Court of Appeal 1994 r 18(4)(e)
Rules of the Federal Court 1995 r 57(4)(e)
Rules of the High Court 1980 O 42 r 1, 53 r 1A
Subordinate Court Rules 1980 O 49 r 2(3)
Town and Country Planning Act 1976 ss 2,3, 4, 5, 10, 18, 19, 21 22, 22(3), w 23, 24(5), 213(1)

Appeal from: Originating Motion No 27–73–93 (High Court, Pulau Pinang)

RR Sethu (*R Rajasingam* with him) *(Rajasingam & Co)* for the appellant.
Cyrus Das (*Karin Lim* with him) *(Presgrave & Matthews)* for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): Compelling arguments have been made to us by counsel for both parties on whether or not a decision made by the respondent could and should be subject to judicial review. The scope of these arguments, the complexity of the issues raised, and the multitude of Malaysian and Commonwealth authorities cited have all forced us to take some time to finalize this judgment. Our hope is that it will help to clear some doubts on important points of public law.

HISTORY

Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd ('the appellant') is a co-operative society registered under the Co-operative Societies Act 1948. The appellant owned the land comprised in Lot 006099 Mk 13 DTL Sungai Gelugor, Pulau Pinang ('the said land') . The said land was 1.9 acres in area and had road frontage along Jln Helen Brown. On 22 March 1987, the appellant's members decided at an annual general meeting ('AGM') that low-cost flats should be built on the said land (652) to be sold to the appellant's members or their dependants (The numbers in brackets where given hereafter are references to the relevant pages in the appeal record.). Mr Lawrence Loh ('the architect') was engaged to process the necessary documentation and plans, which were

for a 'proposed single block of 10-storey flats (each under 700 sq feet) which included 183 units of flats and seven units of shops' and apply for planning approval.

On 21 April 1990, the appellant entered into a joint venture agreement ('the said agreement') (561) with Rethiko Sdn Bhd ('Rethiko'). The preamble to the said agreement stated, inter alia:

(1) that Rethiko has a license to develop housing schemes;

(2) that the appellant had applied for planning permission to put 190 units and would try to obtain the maximum density of 100 units per acre; and

(3) that Rethiko would pay the appellant RM900,000 if planning approval was obtained for 190 units.

The body of the agreement stipulated, inter alia, that:

(1) the appellant appointed Rethiko to develop and manage the project;

(2) the premium of RM900,000 would be paid in instalments;

(3) the appellant undertook and guaranteed to secure purchasers for all 190 units;

(4) the selling price of a two-bedroom flat measuring an average of 500 sq feet shall not exceed *RM32,000* and a three-bedroom flat measuring an average of 650sq feet shall not exceed *RM45,000* (Emphasis supplied.);

(5) 110 units would be two-bedroom flats, 74 units would be three-bedroom flats, five units would be shop-houses and 12 would be shop lots outside the building;

(6) the appellant would be a party to all contracts of sale of the individual units;

(7) the appellant and Rethiko shall conform to the Housing Developers (Control & Licensing) Act 1966, and in particular regs 5(5)(a), 10 & 11 of the Housing Developers (Control & Licensing) Regulations 1989; and

(8) the developer shall not charge the said land but use its own financial resources to complete the project.

The appellant was to continue to own the said land until such time as it was required to transfer the units to its member purchasers, whereas the financial risk to provide the entire capital required to push the project through fell on Rethiko, whose profit must have been the difference between the price at which the units were sold and Rethiko's total outlay. RM900,000 was the appellant's share of this projected difference. By

A virtue of retention of ownership of the said land, the control of the project till ultimate sale remained with the appellant with negligible financial risk.

The first formal response by the respondent to the application for planning approval was a letter dated 18 June 1991 (680) in which the respondent's secretary required the appellant to amend its plans within B two months to take into account the requirements of the town planning department, and various other departments. A copy of this letter was sent to the architect.

The requirements aforesaid were listed in a separate enclosure headed 'Kehendak-Kehendak Perancangan Bandar' (681). Under item 5, the C respondent stated that the permitted density was 60 units per acre whereas the proposed density was 99.06. Item 6 stated that the developer should comply with the respondent's 'Guidelines for low-cost flats' (Garispanduan-garispanduan mengenai rumah pangsa murah majlis) ('the said guidelines'). Item 8 stated that a co-operative society was entitled to a density of 100 D units per acre. Item 11 stated that 30% of the low-cost houses have to be built and sold at a cost not exceeding RM25,000 per unit in accordance with government policy.

In evidence in the court below was a photocopy of the cover sheet and three pages of a publication instituted 'Dasar-Dasar/Garispanduan-E Garispanduan' (652). The first page is a foreword by the respondent's secretary to say that these guidelines were being published for the benefit of the public to inform them of the planning and building requirements of the respondent. The second and third pages are headed 'Guidelines for the development of low-cost flats' and stated to have been passed on 7 F December 1978 and 12 March 1983 (656). There are nine items here. Item 1 provided for a density of 60 units per acre, item 2 stipulated that the area of each unit should not exceed 700sq feet. Item 4 stated that the cost of each unit should be about RM25,000. The actual words used are 'Hendaklah lebih kurang RM25,000 bagi tiap-tiap satu unit'. The G respondent has nowhere in the proceedings here or in the court below classified by what margin the cost could exceed or fall short of RM25,000. (If around RM25,000 was the right price on 12 March 1983, what should have the price in 1991?. 'Lebih kurang' obviously permitted some flexibility which should take into account price fluctuations in the economy). Item 9 H stated that the on an ad hoc basis the respondent would consider applications for increased density but the maximum permitted density shall not exceed 100 units per acre.

On 13 August 1991, the architect replied to the respondent's letter of 18 June 1991. Point by point he dealt with the respondent's guidelines. He I asked for a density of 100 units per acre, but as to item 11, he stated:

> Syarat ini telah dinotakan di atas pelan. Ingin dimaklumkan bahawa syarat ini telah dinotakan di bawah bantahan. Pihak pemaju akan merayu terhadap syarat ini kemudian.
>
> (This condition has been noted on the plan. Please be informed that this condition has been noted under objections. The developer will appeal against this condition later.)

The respondent's letter dated 18 June 1991 did not use the word 'Condition' (Syarat) but 'Requirements' (Kehendak-kehendak). The architect should have referred to item 11 likewise.

By a letter dated 7 September 1991, the respondent wrote to inform the appellant that the planning permission had been granted on 6 September 1991 for the proposed project. This letter (580) stated that the planning permission would expire on 5 September 1992. The rest of the letter related to provisions for the sale of 30% of the units to Bumiputeras. The planning permission was contained in a separate document (581). It was for one block of low-cost flats consisting of 183 units and seven shops on the said land. It referred to r 10(1) of the Planning Control (General) Rules 1990, r 10(1) pursuant to s 22(3) of the Town and Country Planning Act 1976 ('the Act') and purported to be in Form C(1) ('the said planning permission'). It stated in so many words, 'The grant of planning permission is subject to the following conditions,' and spelt out seven conditions.

Section 22(6) of the Act reads:

> (6) If planning permission is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form and at the same time a notice of the grant thereof shall be given to any person who has made any objection pursuant to section 21(6).

Apart from a condition that the authorized maximum density shall not exceed 100 units per acre, the six other conditions stipulated made no reference whatsoever to its being a condition that the cost of the units should not exceed RM25,000 per unit. It should be reiterated here that in item 11 of the respondent's list of requirements dated 18 June 1991, the respondent required the price to be not exceeding RM25,000, and on 13 August 1991, the appellant had objected to this. If the respondent regarded the cost of RM25,000 as being an inflexible condition, it could have stipulated so on 6 September 1991. Condition (vii) stated that the grant of planning permission shall not restrain and preclude the respondent from imposing any requirement or condition before the building plan is approved. In his submission to us, Mr Das conceded that the respondent was aware of the contents of the said agreement when the said planning permission was granted on 6 September 1991. The point is that, the respondent knew then that the proposed prices was RM32,000 for a two-bedroom unit and RM45,000 for a three-bedroom unit.

A On 14 December 1991, the appellant and Rethiko had entered into a supplemental agreement ('the supplemental agreement') (574). It referred to the extra RM117,300 payable to the respondent in lieu of the open space and the additional 'gerai' (external shops) approved on the lay-out plan and the rise in the cost of raw materials and labour since the said B agreement was executed and provided that the selling price of the two-bedroom units should be increased to RM38,000 and the three-bedroom units to RM62,000 ('the new prices'). The new prices had been circularized to all the appellant's members.

Some of the appellant's members objected to these prices. By a letter C dated 12 December 1991 (606), 151 of them sent a joint petition ('the said petition') to the respondent's president, the director of buildings, council members and to the director of co-operatives. The said petition complained, inter alia, that the appellant was going to build flats on the said land at a cost exceeding RM25,000; that the members could not afford to buy medium-cost houses, and so on. The prayer was that a condition should D be imposed that 75% of the units to be built on the said land should be sold at a cost not exceeding RM25,000 and if such a condition was not imposed, this project should be scrapped. Despite this petition, the new prices were ratified at a special board meeting of the appellant on 30 January 1992.

E The said petition made it patently obvious to every person in authority in the respondent's institution that the appellant was going to sell the proposed units at a price well in excess of RM25,000. In accordance with condition (vii) of the said planning permission, the respondent could, at this stage, have imposed a condition that the cost of 30% of the units F should not exceed RM25,000 each. It did not do so. The sequence of events immediately thereafter was that, the plan was formally approved on 21 February 1992, and on 24 February 1992, the respondent's director of buildings sent a formal letter (766) to the architect with a copy to the appellant to state that he had been directed to refer to this petition and to G inform the architect and the appellant that the respondent's council had at its meeting on 13 February 1992, decided that the respondent had no authority to make any decision with regard to this petition and accordingly referred the matter back to the appellant co-operative to decide the matter.

The respondent's letter of 24 February 1992 literally left the question H of pricing to be settled internally as a domestic problem between the appellant and its members. In the event, the appellant and Rethiko sold 70 out of the 110 units at RM35,000 and 33 out of the 83 three-bedroom units at RM62,000.

Although Rethiko had obtained its license to proceed with this I development under reg 3(6) of the Housing Developers (Control & Licensing) Regulations 1989 from the controller of housing on 20 December

1991, they were unable to do so because the land was subject to a private caveat and there were squatters on the land (351/9). One of the requirements of the respondent was that all existing structures on the land should be demolished before any building work could begin (583A—reference letter August 1991— PB 30476(LB)). A

One of the squatters on the said land was Robitah bte Aboo Bakar @ Rabeah bte Abu Bakar ('Rabeah'). The house she occupied was No 403 Sungai Gelugor. One of the members of the respondent's council was one Ahmad Miftah Khan ('Khan'). The appellant's secretary gave affidavit evidence in the court below, at first instance, that after the appellant's chairman offered Rabeah two alternatives, she came back to the appellant's office and told the appellant's secretary that Khan was her uncle and that Khan had told her not to settle without him, and that all negotiations should be done by him. As will appear hereafter, Khan had sat in the planning committee meeting which granted the permission on 6 September 1991 and also in its meetings on 20 July 1993, 6 September 1993 and 20 September 1993, when the appellant's request for an extension was considered and only approved with the further condition which the appellant wanted quashed. B C D

By early September 1992, Rethiko was not able to start building works. The planning permission granted in 1991 was due to expire on 5 September 1992. So, on 2 September 1992, the architect applied in writing for a first extension and supported it with the required documentation. E

This application for extension was only considered by respondent at its meeting on 20 July 1993. Why it took over 10 months for the respondent to deal with this application was not explained. At no time prior to 20 July 1993 did the respondent give the appellant any notice that additional conditions were being considered. The decision reached was conveyed to the appellant by a letter dated 30 July 1993. The first paragraph of the letter stated that the respondent had agreed to grant the first extension subject to the following additional conditions: F G

(1) the requirements of the JKR dated 5 November 1992 must be complied with;

(2) the completion of 30% low-cost at RM25,000 per unit ('the second condition') ('menyediakan 30% kos rendah atas harga RM25, 000 seunit"); and H

(3) the sale of the units are limited to the members of the appellant only.

The second paragraph stated that the extension was from 6 September 1992 to 5 September 1993. Thus, it was not for a year but was in effect for 47 days from the date of decision. Since this decision was only communicated by letter dated 30 July 1993 and received on 31 July 1993, I

A it was effectively an approval for 35 days! Another curious feature of this letter is that the technical requirements of the approved plan were still being processed on 5 November 1992, although the first planning permission lapsed on 5 September 1992.

In the third paragraph the respondent's planning director said he was B again drawing the attention of the appellant to s 20 of the Act which states:

> No person shall commence, undertake or carry out any development otherwise than in conformity with the planning permission granted to him under section 22 in respect of the development or with the conditions of the planning permission.

C The letter further stated that, thus, if the appellant was minded to apply for an extension of the period of the planning permission, the application for such extension had to be made together with the fees payable before the period or the extension of planning permission expired, and that no further reminder would be sent in this connection.

D By a formal letter dated 10 August 1993, the appellant appealed to the respondent to reconsider its second condition. The letter was addressed to the respondent's secretary. It ran into 3 pages. Copies were extended to the architect, the director of buildings, and Rethiko. The contents of this letter have to be set out in some detail. In the opening paragraph, the E appellant's secretary stated that the co-operative was appealing to the respondent to reconsider the second condition on the following grounds:

1(a) the request was for extension of permission and not for a new project;

(b) the condition imposed was of retrospective effect and therefore unfair;

F 2(a) the proposed building was for a co-operative and not a profit making institution. The respondent had done much to promote the co-operative movement in providing houses for its members. The second condition was inconsistent with the respondent's spirit of assisting co-operative building programmes;

G (b) (elaboration of 2(a)); and

(c) the units were for sale to members and their family only and the issue of sale to outsiders did not arise.

3 the cost of the units were fair, ie RM35,000 for a two-bedroom unit and RM60,000 for a three-bedroom unit and from all aspects this H was a low-cost building;

4 the buyers of these units from amongst the appellant's members had already made heavy financial contributions towards the cost of purchase; and

I 5 there was no such condition in the original planning permission and in the absence of such a restriction:

(i) the co-operative had sold 70 out of the 110 two-bedroom units at RM35,000. The remaining 80 units were priced at RM60,000;

(ii) the design and the cost could not now be amended to provide 30% low-cost (units) in the same building and to reduce the cost of the remaining unsold units would cause the co-operative financial loss; and

(iii) the co-operative had already signed agreements with Rethiko which had obtained a developer's license and compliance with the new condition would cause the appellant to breach the said agreements and expose it to claims for damages.

On 60 of the two-bedroom units sold, 10% totalling RM347,909.21 had been collected. Copy bank statement was enclosed.

Although the extension granted was due to expire on 5 September 1993, the appeal was only considered on 20 September 1993. The respondent's decision was that the appeal be rejected. The decision was communicated by a letter dated 23 September 1993. It brusquely stated that the appeal was rejected and the two additional conditions ie 30% at RM25,000 and sale to members only were reaffirmed.

Whilst the appellant's request for an extension was pending, the appellant acted on Rabeah's assertion that she would only negotiate the terms of her vacating her premises through her uncle Khan. The appellant's secretary gave affidavit evidence that on 3 May 1993, he wrote a letter to Khan to assist in the negotiations. The same letter was sent to Rabeah on 12 May 1993. Rabeah replied on 13 June 1993 that she would only meet the appellant's secretary if Khan was present.

The secretary agreed. On 15 June 1993, the appellant held a committee meeting which Rabeah attended with Khan as her spokesman.

The appellant's secretary version of this meeting is that Khan disclosed that he was a municipal councillor who could jam the project if he wanted to, and insisted that Rabeah should be given one two-bedroom flat free. (The appellant's earlier offer of a 20% discount on RM35,000 was rejected). The appellant's minutes of this meeting (591) showed there was lengthy discussion before terms were agreed which were formally confirmed at the appellant's board meeting on 25 August 1993. On 1 September 1993, the appellant's secretary sent Rabeah a formal agreement already executed by the appellant (598). Rabeah did not sign. According to the appellant's secretary, Rabeah told him that Khan had told her not to sign until 'the building plan was renewed', and also that Khan was recommending additional conditions on the approved plan.

Khan denied that he received the appellant's letters but admitted that he attended the appellant's committee meeting on 15 June. He further admitted that he disclosed to the appellant's committee members that he

A was a member of the municipal council but claims that he did so only to clarify that he was there not as a municipal councillor but as an uncle of Rabeah. He vehemently denied that he abused his status as a councillor. He admitted also he asked for Rabeah to be given a free unit because that was just, but denied that any agreement was reached on 15 June. He B claimed the appellant's minutes were fabricated as an afterthought to support its case. He further claimed that a week after this meeting there was another meeting between him and Rethiko's representative in which it was agreed that Rabeah would be given a three-bedroom flat This offer Khan said, he accepted but he made it clear that Rabeah's house should only be destroyed after the respondent had approved the building plans. C He claims that he never spoke to Rabeah about the renewal of the plan or any additional conditions. He admitted he participated in the meetings on 20 July 1993, 6 September 1993 and 20 September 1993, but asserted that he in no way influenced the committee to impose the second condition, which he said was imposed to implement government policy. He claims D that no member of the council knew of Rabeah's problems and that the provision of a free unit for Rabeah had no connection with the second condition and that he never influenced the other councillors (373–379).

Now s 23 of the Act provides that an appeal against the decision of the local planning authority made under s 22(3) may be made to an appeal E board within one month of the communication of such decision. The respondent could have refused to accept the appellant's appeal for reconsideration, but instead it accepted the request and considered it at planning sub-committee level on 5 September 1993 before the main committee on 20 September 1993 and rejected it.

F On 11 October 1993, the appellant filed an ex parte application for leave to apply for certiorari. Abdul Hamid J directed it be heard inter partes on 11 November 1993, and dismissed it on 16 December 1993.

The grounds on which the relief was sought before Abdul Hamid J briefly were that, the decision made on 20 September was a nullity because G it was against natural justice, ultra vires, unreasonable, irrational and mala fides; and in making the application, the appellant contended that the court's jurisdiction was unaffected by the existence of any alternative statutory remedy because in the public interest judicial review was the most convenient and effective remedy.

H The aforesaid factual history was there in the affidavits filed on behalf of the respective parties. The respondent claimed that the Act, the connected subsidiary legislation and government policy directives gave it full power to do what it did. Three further affidavits filed by the appellant, without leave of the court, after the conclusion of the hearing on 11 I November 1993, were disregarded. Respondent's counsel took only two points (771). Firstly, he submitted that the substantial decision sought to

be quashed was made on 20 July 1992 and therefore the appellant was out of time as more than 6 weeks had elapsed (O 53 r 1A of the Rules of the High Court 1980). Secondly, it was contended that as s 23 of the Act provided an alternative remedy by way of an appeal, the failure to appeal was fatal. He cited *Government of Malaysia & Anor* v *Jagdis Singh* [1987] 2 MLJ 185.

The only ground on which Abdul Hamid J rejected the application was that the appellant had not availed itself of its remedy under s 23(1) of the Act, that is to say that its failure to appeal was fatal to the application. Indeed, the judge was at pains to say that, even though the decision in *Jagdis Singh* concerned the disposal of the substantive motion, the position was the same at the application for leave stage because the availability of the remedy of appeal could not be disputed (781). He then went on to hold that by virtue of the words of s 24(5) of the Act, it could not be shown that there was a clear lack of jurisdiction when the second condition was imposed. He said that the issue of failure to perform a statutory duty did not arise and declined to go into the accusation against Khan except to say that he failed to see the connection with the conditions imposed in accordance with the policy of the state government. In the concluding paragraph of the judgment, the judge again reiterated the failure to appeal as being critical to the dismissal of the application for leave.

This issue was raised in the memorandum of appeal and fully argued in the Supreme Court, which ordered on 28 February 1994 that the decision given by Abdul Hamid J be set aside, that the appellant be granted leave to apply for certiorari, and that the substantive motion be heard by another judge ('the judge').

Accordingly, the appellant filed the substantive motion on 4 March 1994. The judge ordered written submissions which were filed. By 18 July 1994, when the parties appeared before the judge, there were eight affidavits filed on behalf of the appellant. Nine affidavits had been filed for the respondent. The respondent once again raised the issue of alternative remedy being fatal to the motion.

The appellant's first submission to the judge was that this issue was res judicata and no longer open to the respondent to ventilate. On 18 and 19 July 1994, the judge directed the parties to submit further on this one issue. He then reserved judgment to 5 August 1994.

In the interim, the respondent filed two more affidavits and the appellant filed one. Both parties filed additional submissions.

On 5 August 1994, the judge gave his reasons and dismissed the application. The record reads as follows:

> Mahkamah: After having heard counsels of both parties earlier and having read the order of the Supreme Court, I am of the view that the decision of

A the Supreme Court on 26 February 1994 was merely to give leave to the application for certiorari by the applicant and to have the case heard before another judge on the entire merits of the application. From that said order of the Supreme Court attached I am convinced that it did not decide on the issue of domestic remedy that was raised by the respondent.

Mahkamah: Application by the applicant is dismissed with costs.

B

It would thus appear that the judge's one and only ground for dismissing the application was the existence of the alternative remedy.

A notice of appeal to us was filed on 12 August 1994. On 7 October 1994, the learned judge supplied further grounds of judgment. It is a fair C inference that well before that date, the order (16) had already been extracted.

FIRST ISSUE

D *Did the Grounds of Decision Supplied by the Judge after the Filing of the Notice of Appeal Constitute a Judgment?*

Mr Sethu said that these further written grounds provide reasons other than the failure to exhaust the domestic remedy to justify the rejection of the application. He submitted that a judge who has given a judgment with E grounds is functus officio and cannot subsequently go outside those grounds. He cited two cases: *Ankur Nath Ganguli v PP* [1956] 22 MLJ 26 and *Nathan v PP* [1972] 2 MLJ 101. The first case turned on the proper interpretation of s 21(1) of the Court Ordinance 1948 which only permits the supply of grounds of decision after a notice of appeal has been filed, if F the judge has not already written his judgment earlier, ie given recorded reasons when convicting the accused. The second decision turned on s 302(3) of the Criminal Procedure Code (Cap 6) which requires the court appealed from, to make a signed copy of the grounds of decision when a notice of appeal has been lodged. In that case, the appellant contended that there were three sets of decisions: (i) the oral grounds given at the G time of conviction when offending words were used; (ii) the signed grounds after the notice was filed; and (iii) corrections and deletions subsequently made. HS Ong FJ held that the only judgment for the consideration of the court is the second or signed grounds. He further held, following *Loh Kwang Seang v PP* [1960] 26 MLJ 271, that it was not competent for the H court to supplement the signed grounds or make deletions therefrom.

No authority directly on point in a civil case has been cited to us, and the complaint is too serious not to merit some analysis.

Subject to correction, the supply of grounds or reasons for judgment has not been specifically spelt out in the Courts of Judicature Act 1964 I ('the Judicature Act') or for that matter in the Rules of the High Court

1980 ('the Rules'). In the Judicature Act, s 94 requires the delivery of judgments of the Federal Court in open court. Order 42 r 1 of the Rules has made the same requirement. In ordinary and even legal parlance, a 'judgment' is taken to mean both the intellectual process of arriving at a decision for the resolution of a dispute as well as the decision itself. Order 42 r 5 states that if in the case of any judgment a form thereof is prescribed in Form 79, the judgment must be in that form. If by a judgment we mean the written statement containing the facts found, the inferences made and the law applied in coming to a verdict, then 'judgment or order' clearly do not mean the same thing. The term 'grounds of decision' comes into play only when notice of appeal has been filed [see O 49 r 2(3) of the Subordinate Court Rules 1980, r 18(4)(e) of the Rules of the Court of Appeal 1994 and r 57(4)(e) of the Rules of the Federal Court 1995]. These rules are not similarly worded so far as the High Court is concerned. It is clear that a 'written judgment' when juxtaposed with 'grounds of decision' does not mean the same thing as the 'judgment, decree or order appealed from' which has to be separately attached under r 18(4)(d).

We are unable to say from the record whether there was a separate application by the appellant for the grounds of decision, or whether these were gratuitously supplied by the judge when the notes of evidence were applied for. However, the reasons given by him for the dismissal of the application, and his decision to do so on 5 August 1994, are recorded in writing by him in his notes (24, 25) and signed.

Albeit with some regret, we must find that this was therefore a written judgment not merely in the sense of an 'order' but also in the sense of an order coupled with the grounds therefor. In *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, the Federal Court followed a long line of cases which held that a judge became functus officio after judgment is delivered and the order drawn up except under the slip rule. In *Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ (Rep) 113, where two conflicting judgments were given in the same matter, the second was held to be a nullity.

Clearing the backlog of cases however has become the top priority, with the result that judges nowadays tend to give short oral reasons for their decisions at the end of the trial. Courts should tell litigants where they have gone wrong. Longer written reasons are only supplied when the filing of a notice of appeal makes them absolutely necessary to achieve optimum time utilization. But supplementary grounds after a written judgment has been delivered may well affect judicial credibility because they could easily be mistaken for the wisdom of hindsight rather than representing the actual decision-making process. Consequently, we agree that it is undesirable to have two written judgments in the same case. However, this finding should not cause any injustice to the parties, since this appeal is by way of rehearing and we must tackle afresh all the issues raised in the court below, including those the judge did not deal with.

A SECOND ISSUE

Did the Decision of the Supreme Court Preclude the Judge from Entertaining the Issue that the Availability of the Alternative Remedy of Appeal was Fatal to the Substantive Application and Compel him to Consider the other Issues Raised by the Appellant?

B Unfortunately, the Supreme Court in this case did not give its reasons for reversing Abdul Hamid J, and the respondent was thereby permitted to reopen the issue.

As will be remembered, Abdul Hamid J held that it did not matter C that in *Jagdis Singh,* this issue was decided in the substantive stage. To him, the same considerations applied at the application for leave stage. It is not possible to say whether this issue was ventilated at all in *Jagdis Singh*'s case at the application for leave stage (see [1981] 2 MLJ p 186B–C) whereas in the case now before us, it is clear that this issue was fully argued at the first application for leave stage and decided against the D appellant not just as a ground for refusing leave, but for refusing any relief altogether. The issue was also fully argued before the Supreme Court.

We agree with Abdul Hamid J that the correct approach is to decide once and for all at the leave stage whether the availability of the domestic remedy excluded judicial review. As Sir Donaldson MR said in *R v* E *Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717 at pp 723 and 724:

> However, the matter does not stop there, because it is well established that, *in giving or refusing leave to apply for judicial review*, account must be taken of F alternative remedies available to the applicant. This aspect was considered by this court very recently in *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] 1 All ER 257; [1986] 2 WLR 144 and it was held that the jurisdiction would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal G procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided. (Emphasis added.)

In other words, if the appellant can distinguish his case from the type of H case for which the appeal procedure was provided, leave must be given and the court must then proceed to consider all the substantial grounds advanced in the substantive motion.

The appellant submitted to the judge that when the Supreme Court reversed Abdul Hamid J and gave leave, they had cleared the first hurdle. The issue now was no longer whether the appellant were eligible to apply I for certiorari, but whether the material advanced justified the granting of it. They referred to *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657. At p 667 Edgar Joseph Jr SCJ said:

> At this point, we would pause to observe that although the Supreme Court in allowing that appeal did not give a written judgment, it is clear beyond a peradventure that by its decision in allowing the appeal and directing that the application by way of originating summons be remitted to the High Court to be reheard on the merits before another judge, the Supreme Court had made a finding that the Panel's purported decision — which was nothing less than an opinion on the legal consequences of a public censure — was made outside its jurisdiction and was therefore not caught by s 179(8) of the Act which only ousts the court's jurisdiction in respect of the Panel's decision made within its jurisdiction.

After going into the nature of ouster clauses and relevant parts of the second High Court judgment, Edgar Joseph Jr SCJ continued at p 669:

> But, with all due respect to the judge, he ought not, and indeed could not, have reopened the issue of the Panel's jurisdiction to render a purported decision on the legal effect of the imposition of a public censure under s 179(7A) of the Act, regard being had to the clear imposition of the decision of the Supreme Court in the earlier appeal, to which we have referred. In other words, the point about ouster of jurisdiction of the High Court was no longer an issue before the High Court and so the judge ought not to have considered and made a decision on that issue.
>
> Since no written judgment was delivered by the Supreme Court in that appeal, we would, for the avoidance of doubt, say that it is patently obvious that the purported decision of the Panel amounted purely to rendering an opinion on the interpretation of s 179(7A) of the Act itself since it was in substance an opinion as to the legal effect of the imposition of the public censure under the provisions of s 179(7A) of the Act and not a ruling or a decision in the exercise of its jurisdiction under rr 34.1 or 34.7 of the Code.

The material words in the order of the Supreme Court in our case, after it granted leave were, 'Dan adalah diperintahkan selanjutnya bahawa usul substantif didengar di hadapan hakim yang lain...'. The plain meaning of these words were that, the substantive motion be heard before another judge. Instead of equating this expression to mean what it says, the respondent succeeded in convincing the judge that in going into the 'merits' he only need once again to focus his attention not on the legality of the respondent's decision, but on whether the appellants were entitled to ventilate that issues at all.

Mr Cyrus Das relied on *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 at p 229 where Ajaib SCJ said:

> The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the

A appellants and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted.

The judgment suggests that in the High Court the application was ex parte. The matter did not involve the existence of an alternative remedy of appeal. Mr Das also referred to *Inland Revenue Commissioners v National* B *Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 where Lord Diplock said at pp 643 and 644:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the C material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued D at the hearing of the application.

This case also did not concern the availability of an alternative remedy. Mr Das also submitted that the Supreme Court decision did not amount to an estoppel by record or res judicata, and referred to *Hotel Ambassador (M)* E *Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404, *Florence Bailes v Dr Ng Jit Leong* [1983] 2 MLJ 175 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. What Mr Das's submission amounted to was that, in granting leave, the Supreme Court had merely acted on its own previous decisions which was that at the leave stage a judge should not critically evaluate the merits of the application for F leave and therefore the fatality of the alternative remedy was available to be ventilated for the third time.

With respect to Mr Cyrus Das, we were not persuaded. Quite simply, if the Supreme Court thought that the availability of the alternative remedy was fatal, it would not have allowed the appeal. G

The order of the Supreme Court did not contain the word 'merits'. It required consideration of all the issues raised in the substantive motion. An application on the merits is one which depends on the inherent justice of the appellant's contention. It turns on the substantial facts of the case as distinguished from technical objections or collateral matter. H

Faced with voluminous affidavits and intractable issues of administrative law, the route taken in the court below had the doubtful attraction of the line of least resistance. This was regrettable because having directed himself that the judgment of the Supreme Court required him to deal with 'the entire merits of the application', the learned judge I disposed of the appeal not on the entire merits, but on what was in effect a technicality which was no longer open for consideration.

THIRD ISSUE

Was the Right to Appeal in this Case Fatal to the Application of Judicial Review?

This is an issue of great public importance, and we feel obliged to expound why we think judicial review was the correct route in this case.

In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, there are two passages both at p 189 which read as follows:

> Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional cases.

and

> ... the discretion is still with the courts but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

These passages need to be re-examined in the light of the present state of the law. Judicial experience in the past three decades has increasingly brought about a realization that the manner in which a discretion should be exercised cannot easily be pigeonholed into judicial precedent. The factual circumstances giving entitlement to relief are too varied to permit standardization. Just as much as what constitutes 'special circumstances' for granting a stay of execution had defied analysis, so also the prescription 'judicial review will only be exercised in very exceptional cases' has been proven to be a high sounding formula which is incapable of precise application. Unless the general rule can be stated with certainty, it is not easy to determine when something becomes 'exceptional' or 'very exceptional'.

Whether a grievance should be redressed only by way of appeal, or by way of judicial review regardless of a domestic remedy being available, must turn on whether the complaint is one of 'abuse of power'. We use this term in its widest sense and equate it to 'an error of law' as that term is used today to include, inter alia, a denial of a legitimate expectation, a breach of natural justice or a making of a decision which is irrational and unjust. Such a situation would be 'exceptional or very exceptional' because the objective of the decision-making process is to make lawful decisions within the ambit of the statutory powers conferred.

The words 'clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice' which occur in the core passage of *Jagdis Singh* cannot

A today be treated as exhaustive but only as a series of open ended instances in which the court will intervene.

The distinction we are making comes out quite clearly from some of the decided cases where judicial review was refused. Thus, in *Land Executive Committee of Federal Territory v Sykt Harper Gilfillan Bhd* [1981] 1 MLJ 234, B the relief sought was a declaration. There was no allegation of abuse of power. In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, Mr Jagdis Singh's accountant had already filed an appeal on 25 October 1985 against the additional assessment. Whilst this appeal was pending on 14 November 1985, Jagdis Singh filed a motion for certiorari to quash these C additional assessments because they were allegedly based on conjecture, and issued maliciously and as a vindictive act. From p 191G of the judgment, it is clear that the Supreme Court critically analysed all the evidence led to support these allegations and found them to be made without foundation. In other words, the court found as a fact that there was no abuse of powers. D So also in the English and Commonwealth cases cited to us and also the Irish case of *The State (Abenglen Properties Ltd) v The Right Honourable The Lord Mayor Aldermen and Burgesses of Dublin* [1982] ILRM 590.

Mr Das submitted that *Lai Cheng Choeng v Sowaratnam* [1983] 2 MLJ 113 was wrongly decided, and requested us not to regard ourselves E as bound by it. He singled out a passage from the judgment of Wan Sulaiman FJ which he said went too far. It reads:

> It would seem to us that somewhat different considerations govern the exercise of the court's discretion in deciding whether certiorari would apply from those which govern the exercise of its discretion in making a declaratory F judgment. For instance the right to certiorari or prohibition may be lost by acquiescence or implied waiver, or unreasonable delay in seeking the relief. See SA de Smith *Judicial Review of Administrative Action* (4th Ed) p 423.
>
> The existence of alternative remedies have negligible effect on restricting the powers of the courts to provide relief. At p 425 of the same edition G appears the following passage, under the heading 'Effect of Alternative Remedies':
>
> > The existence of a right of appeal to the courts from a tribunal's decision does not deprive the courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. Nor is the H applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the courts.
>
> An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy — see *R v Postmaster General, ex p Carmicheal.*

I With respect to Mr Das, we think the passage accurately reflected the law as it was understood in 1983 in the context of that case. The situation

today is that, if breach of natural justice and bias are alleged, the court will examine those allegations to see if certiorari should be issued.

It is not necessary for us to embark here on a detailed analysis of *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 and *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1981] AC 363. Gopal Sri Ram JCA has admirably covered the ground in *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, and we would respectfully adopt it. The relevant passages are at pp 336–342. The conclusion is in these words:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-maker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant consideration (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.
>
> It follows, from what I have said, that the decision of the Board in *Fire Bricks* and all those cases approved by it are no longer good law. By the same token, *Kannan* [1974] 1 MLJ and *Lian Yit Engineering Works* [1974] 2 MLJ 41, though disapproved of or overruled by the Board, must now be taken to have always correctly stated the law.

There is no ouster of jurisdiction provision in the Act. So this case stands on firmer grounds. The principle in Malaysia may therefore be articulated thus:

> The availability of an alternative domestic remedy will not shut out an application for judicial review where the complaint made to the court is one of 'error of law' or 'abuse of power' going to the legality of the conduct of the inferior tribunal or other decision-making authority, unless the alternative domestic remedy was intended for and in fact constitutes a wholly adequate machinery for the just disposal of the complaint in question.

A One final riposte may be made to counter the respondent's claim that there was an alternative remedy by way of appeal. De jure, the statute did confer such a remedy against the decision made on 20 July 1993. But de facto, the respondent fatally compromised that right by entertaining the appellant's letter by way of appeal for review dated 10 August 1993 and B subsequently delaying its response until 23 September 1993 by which time the time period for appealing had lapsed. The respondent's decision on 20 September 1993 was not made under s 22(3) read with s 24(5) of the Act and was therefore not an appealable matter under s 23!! By this quirk of events, the appellant had no domestic remedy left and judicial review was the only way to go.

C

FOURTH ISSUE

Did the Respondent have the Power to Impose Condition that 30% of the Project should Consist of Units Pegged to a Minimum of RM25,000?

D We will now examine the respondent's submission that the reason why the second condition was imposed on 20 July 1993 was that the respondent was under a statutory compulsion to do so by government planning policy, as articulated in the structure plan. Mr Das said that because this was a project for low-cost flats, the appellant knew that it was obliged to comply E with the second condition at all material times even before the said planning permission was given, and that it became necessary to stipulate this as a condition when the appellant applied for the extension because (to use Mr Das's own words) the appellant, 'by its supplementary agreement with Rethiko, had hijacked this project from a low-cost project to something F else' outside the ambit of the said planning permission.

Penang Gazette PU30 of 1984 dated 8 November 1984 notified the public that on 27 October 1984, the state authority with the concurrence of the Minister of Housing and Local Government, had appointed 1 January 1985 as the date on which the Act had come into force for the G whole state of Penang. This Gazette purports to have been made by virtue of s 1(2) of the Act.

Section 4 of the Act constituted a state planning committee which consists of the chief minister as chairman, a deputy chairman being a member of the state executive council, appointed by the state authority and several other dignitaries including the state director of town and H country planning who is the secretary of the committee. The 'state authority' is not defined in the Act but it is accepted that this expression has the meaning attributed to it by the Local Government Act 1976 ('the LGA'), ie the governor in council.

Section 5 of the Act designated the local authority as the local I planning authority and by virtue of s 2, the respondent was the local planning authority in this case.

By s 3 of the Act, the state authority was empowered from time to time to give to the committee or to the local planning authority directions of a general character not inconsistent with the provisions of this Act and the committee or the local planning authority was obliged to give effect to such directions. By s 4(5), the committee was empowered to give the respondent directions not inconsistent with the Act which the respondent was obliged to carry out.

By s 2 of the Act, a 'development plan' meant 'the structure plan' for the area and 'structure plan' meant the structure plan having effect in the area by virtue of s10(6); and a 'draft structure plan' was required to be construed as the context required.

By s 18 of the Act, no person was allowed to use land otherwise then in conformity with the local plan. By s 19, no person could commence or carry out any development unless planning permission had been granted under s 22 or extended under s 24(3). By s 21, the application had to be made to the respondent being the local authority in question.

By s 10 of the LGA, the local authority consisted of the president and eight to 24 councillors appointed by the state authority. By s 28 of the LGA, the respondent was empowered to appoint committees. The respondent said its planning committee was appointed under this section and consisted of 11 councillors of whom Khan was one.

Following s 22(2)(a) and (b) of the Act, Mr Das submitted that in imposing the second condition, the respondent mandatorily had to take into consideration the development plan which by s 2 of the Act was the local plan or the structure plan. He produced for our consideration a document entitled 'Municipal Council Of Penang Island — Structure Plan 1987.'

The statutory sequence by which a draft structure plan becomes a 'development plan' or the 'structure plan' for the area is as follows. By s 9, the respondent is required to publicize its draft structure plan to give all interested parties an opportunity to make representations. After this, the respondent submits the draft to the state planning committee ('the committee') for approval (s 10(1)). Section 10(6) and (7) read:

> (6) Upon approving a draft structure plan, the Committee shall submit it to the State Authority for the assent of the State Authority to the plan, and upon the assent being given, the plan shall come into effect.
>
> (7) The Committee shall cause the fact of assent of the State Authority to a draft structure plan to be published in the State *Gazette* and in at least two local newspapers, one of which being in the national language, together with the marking by which the plan may be identified and a statement of place where the plan may be inspected.

After Mr Sethu's challenge to the admissibility of the 'Structure Plan 1987', Mr Das provided the following additional information.

On 15 September 1987, the respondent printed a 'Draft Structure Plan' (the 'Blue Book') and submitted it to the state planning committee. This committee approved the 'Draft Structure Plan 1987' as provided by s 10(1). The respondent had given the required publicity under s 9(2) of the Act on 16 September 1987. An inquiry committee was appointed and objections were heard from 1–5 December 1987. Having approved the Draft Structure Plan 1987, the state planning committee forwarded the same with a covering letter dated 23 October 1989 to the state authority. By a letter dated 13 January 1990, the state secretary informed the director of the state planning committee that the state authority had given its assent on 20 December 1989.

On 21 May 1990, public notices were published in the New Straits Times and the Utusan Malaysia that the assent under s 10(6) had been given to the draft structure plan identified as 'Municipal Council of Penang Island Structure Plan 1987' which could be inspected at the counter of the City hall. On 14 June 1990, a publication appeared in the Penang Gazette. The cover page of this Gazette refers to *Draft Structure Plan 1989* (Emphasis supplied.). The body of the actual Gazette No 185 recites the Act, s 10(1) and is headed Draft Structure Plan 1987. It contains a foreword from the president of the respondent and runs from pp 237 to 513 — it is a very detailed document both in Bahasa Malaysia and English. Following on this, Mr Das said the respondent published its Green Book 'Structure Plan 1987'. Housing is covered under Ch 4 pp 31–37. Item 4.1(iii), 4.3.2(v) and 4.3.3.(i) reads:

> 4.1 Planning Issues
>
> (iii) the need to control the high price of housing:
>
> The price of housing in Penang is very high compared to the general affordability level of the people although prices of houses have dropped since 1983. The projection of housing needs by different income groups shows that about 30% of the households can only afford to buy housing units costing RM25,000 or less per unit, and a substantial percentage of households (10% to 20%) cannot afford to buy a housing unit even if it was priced at RM25,000. (See Appendix III, table III).
>
> 4.3.2 Adopt Appropriate Measures To Encourage And Assist In The Development Of Land For Housing Development
>
> (v) giving incentives to private developers to build low-cost housing:
>
> It has been estimated that up to 30% of the island's households can only afford the low-cost housing units ie houses costing RM25,000 per unit and less. (See Appendix III, table III). The State Authority requires a certain proportion of housing units in private housing development schemes to be of low cost in view of the substantial need.
>
> To complement, as well as, to consolidate this policy of low-cost housing production, the MPPP shall give incentives to private developers in the form of the following:

(a) granting of higher densities of development;

(b) giving priority in plan processing and approval;

(c) provision of standard building plans for low-cost flats and other low-cost housing units; and

(d) reduction of development charges.

4.3.3 To Take Appropriate Steps For The Provision Of Housing For The Low Income In Line With The Current State Policies.

MPPP recognizes the need to provide adequate housing especially for the low income group. In order to achieve this MPPP shall continue such efforts in line with the current State policies.

Towards this end MPPP shall undertake the following:-

(i) To ensure that a minimum of 30% is allocated for low cost housing for all housing schemes or whichever is determined by the State Authority.

We will assume that this Green Book was published in 1990. We think some attention should be focussed on the fact that RM25,000 in the above passages refers to '*houses*' or housing units as opposed to low-cost *flats* and the need to provide such housing for the '*low-income group*'.

The basis of Mr Sethu's objection to this Green Book is that, contrary to s 10(7) of the Act, 'the fact of assent by the state authority to the draft structure plan' was never 'published in the state gazette' and therefore, in law, this draft structure plan never became the structure plan and has no legal effect.

There was then a contest with Mr Das saying that the requirement in s 10(7) was merely procedural and directory. Mr Sethu said it was mandatory. He referred to *Cheong Seok Leng v PP* [1988] 2 MLJ 481, and s 61 of the Interpretation Act 1948 and 1967. Furthermore, the gazette of 14 June 1990 was not published by the state planning committee but by the respondent's president. An added discomfiture here is that the plan referred to on the gazette title page is a Draft Structure Plan 1989 whereas the first page of the gazette refers to a Draft Structure Plan 1987.

In the face of these difficulties, we have to ask ourselves where did the 'Guidelines for the development of low-cost flats' come from? The printed copy provided by the appellant (652-656) says they were passed on 7 December 1978 and 12 March 1983, ie before the Act came into force in Penang on 1 January 1985. As to the cost, it says, 'lebih kurang'. There is no reference to 30%. The typewritten list attached to the respondent's letter to the appellant dated 18 June 1991 (680) is not called guidelines but 'Kehendak-Kehendak Perancang Bandar', and the letter describes the documents as 'the requirements of the Town Planning Department, the Building Department, the Engineering Department and the Health Department of the City Council.'

A We think that despite Mr Sethu's criticisms, the Draft Structure Plan 1987 did come into effect on 20 December 1989 not only by virtue of the provisions of s 10(6) but also by virtue of the definition s 2 which refers to a structure plan 'having effect by virtue of s 10(6)'.

However 'guidelines' are only a statement of principles pointing the B general direction. In the absence of any suggestion from the respondent that they were repealed, we must act on the basis that the said guidelines passed on 12 March 1983 were still in force in 1991. These guidelines clearly permit some flexibility in the cost of low-cost flats — 'lebih kurang RM25,000'. Against this backdrop, the 'requirements of the respondent's list of 18 June 1991' cannot be treated as non-negotiable.

C We do not think it was ever the policy of the state authority that private developers should build houses at a cost of say RM38,000 each to themselves and sell them at RM25,000. The paragraphs from the Green Book we have extracted and upon which Mr Das so heavily relies required the respondent to give incentives to developers to make it possible for D them to sell off 30% of the total development at RM25,000 each when the incentives given have made the whole project financially feasible from the costs recovered from the sale of the balance of the 70%.

In an appropriate case, we think it would be quite in order for such a requirement to be imposed as a condition to the grant of planning E permission, but obviously this calls for an overview of the total cost of construction and projected profits.

The crucial considerations here are that, the respondent knew on 6 September 1991 that the proposed price was RM32,000 and RM45,000. The respondent knew that the appellant did not agree to requirement 11 in the respondent's list of 18 June 1991 that the price should not exceed F RM25,000. They also knew that these prices were a private internal arrangement between the members of a co-operative and the party they had chosen as their developer. In other words, the price had been agreed by the prospective purchasers through their lawfully elected representatives. With all this knowledge, the fact is that the respondent did *not* make it a G condition then that 30% of the 183 flats (ie 55 flats) approved should be sold at a cost not exceeding RM25,000. The wording of s 22(3) of the Act makes it crystal clear that to amount to a condition, it must be so incorporated as to make the planning permission granted subject to such condition, and that such condition must appear in the prescribed form (s 22(6)).

H On the assumption that the respondent had a power to impose such a condition, that power was not exercised on 6 September 1991. Nor was it exercised after some of the appellant's members petitioned the respondent that a further increase was proposed. Indeed, the respondent formally represented to the appellant's members, its architect and to the appellant I itself by letter dated 24 February 1992 that the matter had been considered

at a municipal council meeting no less, on 13 February 1992 which had decided that the increased prices were purely an internal matter for the appellant (776). The aggrieved members did not appeal nor did anyone else complain about this decision. A

The submission made by Mr Das that because this project was described in so many words in the said planning as 'one block 10-storey low cost flats (183 residential units and 7 shop units)' it necessarily followed that the units must be sold at not more than RM25,000, because low-cost means not more than RM25,000 cannot be right because such a view cannot be reconciled with the respondent's council's decision of 13 February 1992. B C

FIFTH ISSUE

Did the Respondent Have a Legitimate Expectation to Have the said Planning Permission Renewed on the Same Terms for Another Year? Was the Respondent Guilty of Abuse of Powers or Error Of Law in Imposing the Second Condition? D

It was once thought and indeed Mr Das submitted that a legitimate expectation consisted only of an aggrieved person's right to be heard before a decision was taken which was adverse to his interests. With respect, the law has come very much further than that. E

The most recent exposition of this concept is to be found in the judgment of Simon Brown LJ in *R v Devon County Council, ex p Baker & Anor* [1995] 1 All ER 73 at pp 88 and 89. We think it should be set out here in full:

> What this case concerns is the administrator's duty to act fairly and in accordance with the procedural proprieties. How is the extent of this duty to be ascertained? F
>
> Much of the argument before us, not only in the Devon case but also in the Durham case, centred upon the concept (doctrine, principle, call it what one will) of legitimate expectation. This concept, as it seems to me, has now become so widely and variously invoked that it is time to examine what actual assistance can be derived from it, in particular in situations such as arise here in Durham. G
>
> It is first, I think, convenient to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays used. H
>
> (1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as *R v Secretary of State for the Home for the Home Dept, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, [1990] 1 WLR 1545 and *R v Jockey* I

Club, ex p RAM Racecourses Ltd (1990) [1993] 2 All ER 225. The various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v Torbay BC, ex p Cleasby* [1991] COD 142; of the latter; *Ex p Khan.*

(2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904, [1969] 2 Ch 149, *O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 and the recent decision of Roch J in *R v Rochdale Metropolitan BC, ex p Schemet* [1992] 1 FCR 306 are clear examples of this head of legitimate expectation.

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As was pointed out by Dawson J in *AG for New South Wales v Quin* (1990) 93 ALR 1 39 this use of the term is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself:

> No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon

> some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589, [1972] 2 QB 299 and *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346; [1983] 2 AC 629 are illustrations of the court giving effect to legitimate expectations based upon express promises; *Council of Civil Service Unions v Minister for the Civil Service* an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications.
>
> Let me acknowledge at once that the above is by no means an exhaustive analysis of the concept of legitimate expectation; anyone interested in that should study instead Mr Paul Craig's illuminating article 'Legitimate expectations: a conceptual analysis' (1992) 108 LQR 79. Rather it is an attempt at a broad categorization which may, I hope, clear away some at least of the many semantic confusions that have bedevilled this area of our law.

Taking this concept in the first sense, the said planning permission granted the appellant a substantive right. The respondent's council's decision of 14 February 1992 was a clear unambiguous representation that the appellant was not pegged to selling its units at prices not exceeding RM25,000. The appellant relied on the representation, and in accordance with its internal procedures, fixed the *new* prices at which the units would be sold and proceeded to sell them. Since the respondent was fully aware of these prices and had stated a council's decision that the prices were an internal matter for the appellant, we are of the view that the respondent was not entitled to change its decision so as to adversely affect the claimant. There is an estoppel here.

In the second sense, we think that the respondent should have given advance notice of its intention to impose the second condition because the rules of natural justice demanded it. It is very possible that if a fair opportunity had been given to make representations, the second condition would not have been imposed on 20 July 1993.

In the third sense, we think that it cannot be said that the respondent acted fairly in this case (we will come back to the question of bias and Khan's involvement later) because the decision-making process is shown to be fatally flawed by the reasons which the respondent's planning director, Mr Tan, subsequently advanced to justify the imposition of the second condition.

We need to emphasize here that there is statutory requirement that the proceedings of all the respondent's committee meetings to be minuted. No minutes have been produced of the meetings on 20 July 1993, 5 September 1993 or 20 September 1993 at which the appellant's request for extension was entertained, and its appeal for reconsideration rejected.

Why it took almost 11 months to consider the extension, what views were expressed by the councillors at these meetings for the imposition of the second condition and the rejection of the appeal, has not been disclosed to the court.

What the planning director subsequently affirmed the second condition to mean is a matter for some astonishment. By July 1993, the appellant had sold 70 out of the 110 two-bedroom units at RM35,000 each. So there were 40 left. Out of the 83 three-bedroom units, it had sold 33 at RM62,000 each. The heading to the respondent's letter dated 30 July 1993 imposing the second condition refers specifically to the said planning permission, this project of 190 units and the said land. The plain meaning of the letter was that 30% of these units should be built and sold at RM25,000 per unit. The appellant's appeal letter of 10 August 1993 makes it clear that this was the sense in which the second condition was understood by the appellant. It was pointed out that it was practically impossible to turn the clock back and fulfill such a condition. The appellant pointed out that the format of the approved plans and its cost structure for the existing project could not be changed without great financial loss. The respondent's planning director who replied on 23 September 1993 did not suggest that the appellant had misunderstood his meaning. The rejection was unqualified and absolute, and the second condition was reaffirmed in the same terms.

After the proceedings were commenced, the respondent's planning director filed an affidavit sworn on 10 November 1993. In this, he stated (389) that the intended meaning of the second condition was not that 30% of the 190 units should be sold below RM25,000 each, but that since in accordance with state policy '30% of low cost houses contributed must be sold at RM25,000 per unit', the appellant was permitted to build a further 30% residential units for sale at RM25,000 excluding the proposed number of residential units which had been approved based on the maximum permitted density. He further stated that the appellant had thus been given a choice of adding 55 residential units to the 183 units which had been permitted.

Taken at face value, what this means is that 238 units were now to be built on the said land. Such a requirement would have violated s 18 of the Act and the respondent's own statutory limitations on density which had a maximum of 100 units per acre. The entire project would thus have had to be radically altered because in accordance with the said planning permission, the RC plans, sewerage plans, plumbing and drainage had already been submitted on the basis of 190 units, and approved as such.

The point here is that, the appellant had not applied for a variation of the planning permission, but only for an extension. It was too late to change the pricing of the existing 190 units. By seeking to compel the

appellant to build another 55 units, the respondent was not granting an extension of the planning permission granted for 190 units, but forcing the appellant to put up a new project for 238 units on the said land.

Whilst the intentions of the respondent in seeking to make available to the public low-cost flats at RM25,000 is quite laudable, we do not think this is the right way to go about it. There are strong parallels here with in *R v London Borough of Hillingdon ex p Royco Homes Ltd* [1974] 2 All ER 643 where a planning authority in effect required a developer to assume at its own expense a significant part of the duty of a local authority as a housing authority to provide accommodation to persons on the housing authority's waiting list.

The relevant words in s 24(5) are:

> In granting an extension ... the local planning authority may impose such conditions on the planning permission as it thinks fit or vary the conditions originally imposed...'.

The planning permission here was for 190 units only and the new conditions imposed had to relate to those 190 units. The words 'as it thinks fit' in planning legislation cannot be given their literal meaning so that the planning authority can do as it pleases. As Lord Denning said in *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Anor* [1958] 1 QB 554:-

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that these conditions, to be valid, must fairly and reasonably relate to the *permitted development.* The planning authority are not at liberty to use their powers for an ulterior object, however desirable the object may seem to them to be in the public interest (Emphasis added.)

This principle has been followed by a long line of authority since then and is well established in our law. On the facts, we are constrained to hold that in imposing the second condition the respondent committed an error of law, and that manner in which the respondent went about it constituted an abuse of powers.

SIXTH ISSUE

Did the Conduct of Miftah Khan Vitiate the Decision and if so to What Extent?

These facts are admitted by Miftah Khan:

(1) he is Rabeah's uncle;

(2) he attended a meeting of the appellant on 15 June 1993;

(3) he did so to negotiate the best terms for Rabeah's vacating the site.

(4) he disclosed at that meeting that he was a municipal councillor;

(5) he rejected the terms offered by the appellant and asked for a three-bedroom flat; and

(6) he attended every meeting of the respondent in which the appellant's planning permission was discussed ie 5 September 1991, 20 July 1993, 5 September 1993 and 20 September 1993 and participated therein.

These facts were alleged by the appellant's secretary which Miftah Khan did not admit and/or denied:

(1) that the appellant's offer to Rabeah was the sale of one two-bedroom unit as a cost of RM35,000 less 20% or alternatively to build a wooden house on the said land alongside the LLN reserve;

(2) that at the meeting Khan said after disclosing he is a municipal councillor that he could jam the project and demanded one two-bedroom unit free;

(3) that on account of this threat, the appellant offered Rabeah one two-bedroom units free; and

(4) that Rabeah subsequently refused to sign the written agreement because Miftah Khan had told her not to sign till the appellant's building plan had been renewed and that he was recommending additional conditions.

Mr Das submitted that since the negotiations carried out by Khan on 15 June 1993 had resulted in a free house for Rabeah, in any event, there was no correlation or nexus between the free house and the second condition. Secondly, he submitted that prior to 20 July 1993, 5 or 20 September 1993 the respondent had not conducted itself in such a way that it could not have exercised a proper discretion. Thirdly, he says that the proper test as to whether we should interfere is whether a reasonable man appraised of all the matters in evidence before the respondent's planning committee would have a reasonable suspicion of bias, or in other words, whether in reality, the planning authority had genuinely and impartially exercised its discretion. Lastly, he says it is too much to say that Khan imposed the condition and that it was there from 1991.

As we have already stated, our perception is that in 1991, the said planning permission was unqualified except as to the seven conditions stipulated, and that there is no explanation for the long delay in considering the application for extension. On 15 June 1993, that application was still pending with no indication when it would be heard.

We cannot simply brush aside the serious allegations made by the appellant's secretary of Khan's behaviour on 15 June and that the appellant was intimidated into upping the ante from RM7,000 to RM35,000.

Khan says he asked for a three-bedroom flat but also says no agreement was reached at the meeting. In his affidavit dated 10 November 1993, Khan deposed further (377) that a week after this meeting at the request of the respondent's secretary, Mr Lakhbir Singh Chahl, a further meeting took place between him (Khan) and Mr G Rethinasamy who agreed to substitute a three-bedroom flat, that he (Khan) accepted this offer, but clarified that Rabeah's house should only be demolished after the appellant's building plan was approved by the respondent.

R v Amber Valley District Council, ex p Jackson [1984] 3 All ER 501 is significant to the extent that after *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 was brought to his attention, Woolf J agreed that the test propounded as to whether there was a real likelihood of bias in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304; [1969] 1 QB 577 applies equally to bodies carrying out administrative functions as it does to those carrying out judicial functions. To our mind it is clear from the sentence at p 508J that if there had been an allegation 'that any individual district councillor had some personal financial interest' Woolf J would have granted certiorari.

The facts in *R v Sevenoaks District Council, ex p Terry* [1985] 3 All ER 226 are far removed from ours. That case concerned a district council developing its own land. All the formalities in calling for tenders had been scrupulously observed and planning permission was given to the developer who had submitted the successful tender. There was no question of bias. *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234 was also a case of borough council applying to itself as the local planning authority for the grant of planning permission to itself to erect a supermarket on its own land. It was conceded that there was no bias on the part of the council and the test there proposed must be viewed in this setting. This is spelt out at p 235:

> (3) The test of what a hypothetical reasonable man would apprehend had no application in determining the validity of an administrative decision such as the grant of planning permission. The sole test was whether, despite its interests or its previous actions, the planning authority genuinely and impartially exercised its discretion, since there were many cases in which a local authority's own interests and land were likely to be affected by a favourable planning decision made by it. Accordingly, once a planning authority's decision was found or conceded to be fair there was no requirement to pose some further test by which the decision might be impugned as unlawful or void, either by reference to what the reasonable man would suspect or by reference to whether viewed through some other eyes, such as those of the judge, there was a real likelihood of bias. Since it was conceded that there was no bias on the part of the council, its decision could not be impugned on the grounds that it might have given rise to a reasonable suspicion of bias,

A but in any event a reasonable man knowing all the facts would have reached the conclusion that the council's decision was fair (see p 255 c to e and p 256 b c and f g, post); dictum of Glidewell J in *R v Sevenoaks DC, ex p Terry* [1985] 3 All ER 233 applied; *Steeples v Derbyshire CC* [1984] 3 All ER 468 not followed.

B We do not find this test at all helpful in our present situation, and we do not think it should in any way be allowed to blur the primary duty of any person in authority who has to decide any matter which affects the fate or fortunes of others. Section 34(1) of the LGA provides as follows:

> 34 Disability of Councillors for voting on account of interests in contracts, etc
>
> C
>
> (1) If a Councillor has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority or of any Committee thereof at which the contract or other matter is the subject of consideration, he shall, as soon as possible after the commencement thereof, disclose the fact, and
>
> D shall withdraw from the meeting while the contract or matter is under consideration:
>
> Provided that this section shall not apply to an interest in a contract or other matter which a Councillor may have as a rate-payer or inhabitant of the local authority area, or as an ordinary consumer of water, gas, electricity or other local authority services or to an in any matter
>
> E relating to the terms on which the right to participate in any local authority service, including the supply of goods,is offered to the public.

The source of these safeguards is rooted in a fundamental principle that is as old as homo sapiens. It was articulated in the legal maxims *nemo debet esse judex in propria sua causa* (no man can be judge in his own cause) and
F its companion *nemo sibi esse judex vel suis jus dicere debet* (no man ought to be own judge, or administer justice in cases where his relations are concerned). How harshly the law views a proven breach of these principles was demonstrated by the conviction of the Mayor of Malacca for merely agreeing with the recommendations of his technical committee to pass the plans of a company without disclosing that he was a minor shareholder.
G (See *PP v Datuk Tan Cheng Swee and Ors* [1979] 1 MLJ 166; [1980] 1 MLJ 117; [1980] 2 MLJ 276).

Since the allegations of Khan's pressure and his denials were contained in contested affidavits, it is not possible to make any finding without a trial as to where the truth lies. What we are concerned with here however is not
H whether there was actual bias on the part of Khan, but whether even if Khan was as impartial as could be, right minded persons would think there was a real likelihood of bias on his part. With respect, we think Lord Denning's test in *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1968] 3 All ER 304 at 309 is still the best. To bring home the point to
I everyone concerned in public administration we are reproducing here what he said (at pp 309 and 310):

So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of Lord Hewart CJ in *R v Sussex Justices, ex p McCarthy* [1923] All ER Rep 233 at p 234; [1924] 1 KB 256 at p 259:

> ... it is not merely of some importance, but of fundamental importance that justice should both be done and be manifestly seen to be done.

In *R v Barnsley Country Borough Licensing Justices, Ex p Barnsley & District Licensed Victuallers' Assocn* [1960] 2 All ER 703 at pp 714–715; [1960] 2 QB 167 at p 187, Devlin LJ appears to have limited the principle considerably, but I would stand by it. It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then should not sit. And if he does sit, his decision cannot stand: see *R v Huggins* [1895–99] All ER Rep 914; [1895] 1 QB 563; *R v Sunderland Justices* [1901] 2 KB 357 at p 373 per Vaughan Williams, LJ. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough; see *R v Camborne Justices, ex p Pearce* [1954] 2 All ER 850 at pp 8; [1955] 1 QB 41 at pp 48–51.; *R v Nailsworth Justices, ex p Bird* [1953] 2 All ER 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'

Lannon's only sin was that one of the tenants affected by the decision of the committee was his father. It was acknowledge that there was no want of good faith or actual bias on his part. In the case before us, serious allegations have been made that Khan had used his official position for the benefit of his niece. True they are only allegations, but they are there and have been made on oath.

Lord Denning's judgment was very recently followed by this Court of Appeal in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 where NH Chan JCA analysed the leading authorities on this subject. He said at p 226F that the law assumes bias where a judge has a direct pecuniary or proprietary interest in the subject matter of the proceeding. At p 228E he concluded:

> To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker to

A think or which would have given reasonable ground for him to suspect that the case would not be decided according to evidence.

The facts are that, unless Rabeah vacated, the appellant could not start work, that by June 1993, the appellant had already been kept waiting for 10 months for their application for an extension to be dealt with, that their B discount worth RM7,000 had been rejected, that Khan demanded a three-bedroom flat and that by 20 July 1993, Rabeah had not agreed to anything. Khan's reference to his acceptance of Rethiko's offer in the presence of the municipal secretary and his caveat that Rabeah's premises should not be demolished until the plans were approved is not irrelevant. According to C him, this took place around 22 June 1993. The appellant only sent Rabeah their signed agreement for a two-bedroom flat on 1 September 1993 which she did not accept. Khan wanted a three-bedroom flat. Khan then sat at a sub-committee meeting on 5 September rejecting the appellant's appeal and again on 20 September 1993, at the full committee meeting which D rejected the appeal. It will be recollected that the extension granted on 20 July 1993 expired on 5 September 1993. Reasonable people might well think it a proper inference from these facts that Khan was biased.

It is the opinion of this court that in the first place, Khan should never have participated in the negotiations on behalf of Rabeah. He cannot E be equated to a split personality who is only an interested uncle when talking to the appellant on her behalf and a disinterested councillor when participating in the council meetings. Once he took on the role of Rabeah's champion he should not have sat at the meeting on 20 July or 5 September or 20 September 1993. At the very least, he should have declared his F interest as required by s 34(5) of the LGA which reads:

> 34 Disability of Councillors for voting on account of interest in contracts, etc
>
> (5) The Secretary shall record in a book to be kept for the purpose particulars of any disclosure made under subsection (1) and of any notice given G under subsection (4), and the book shall be open at all reasonable hours to the inspection of any Councillor.

The respondent's failure to produce the minutes of these meetings does not help the respondent's case.

H SEVENTH ISSUE

Was the Conduct of the Appellant such that Discretionary Relief should be Refused?

The initiation of these proceedings and the allegations against Khan I undoubtedly goaded the respondent to mount not just a defence, but an all out counter attack on the bona fides of the appellant.

We have not been able to see anything sinister about the commercial arrangements the appellant made with Rethiko, nor do we view some

clerical discrepancies in the specimen sale and purchase agreement entered into as having any materially adverse effect on their cry for justice.

Regulations 5 of the Housing Developers (Control and Licensing) Regulations 1989 states that, no advertisement or sale shall be made by a licensed housing developer without an advertisement and sale permit having first been obtained from the Controller of Housing. Regulation 5(5) states that such a permit shall not be issued for any housing development in respect of which the licensed housing developer is not the proprietor of the land concerned, but this provision is not to apply if the land owner has executed an agreement with the developer to sell the land for the purpose of the development, and the land owner agrees to abide by reg 10. This reg 10 prohibits the developer from entering into any contract of sale unless the land owner is also a party thereto.

Clause 15 of the said agreement between the appellant and Rethiko specifically provided that both parties will comply with these regulations. On 20 December 1991, the controller issued Rethiko with a license under reg 3(6) and as provided by s 5 of the Housing Developers (Control and Licensing) Act 1966 to proceed with the project (578).

Despite this, at the second hearing before the judge, the respondent's planning director raised an issue that this project was illegal because no permit had been obtained for the sale of the units in question, and that since the license under s 3(1) had been issued to Rethiko, a sale permit should have first been obtained by them under reg 5.

The judge did not deal with this point. It was canvassed before us by Mr Das who contended that even if a case had been made out on the other grounds, relief should be refused because the appellant had not come with clean hands. He referred to *Badat bin Drani v Tan Kheat* [1953] 19 MLJ 67.

With the greatest respect, we cannot countenance this argument which seems to have an element of desperation about it. Section 2(2)(a) of the Housing Developers (Control and Licensing) Act 1966 categorically states that:

> Nothing in this Act shall apply to any society ... incorporated under any law relating to co-operative societies.

These sales were direct sales by the appellant to its members, and since the land was at all times vested in the appellant, the transfer of title would have moved from the appellant to the purchaser. Rethiko was only being paid for goods and services rendered. There is nothing in this point.

EIGHTH ISSUE

What should be the Form of Relief Sought?

Mr Das contended that, if we were minded to grant relief, the whole of the decision should be quashed, and not just the second condition. He says

A the decision cannot be severable. He also submitted that the entire matter should be referred back to the respondent for reconsideration.

We think that a distinction should be made here between the said planning permission, the seven conditions to which it was originally subject, and the additional conditions imposed. We also think a distinction should
B be drawn between that which is void and that which should be cured by judicial review. *Hall & Co Ltd v Shoreham-By-Sea Urban District Council* [1964] 1 All ER 1 is an example of the planning permission having to be avoided because the offensive conditions were fundamental and inseparable from it. *DPP v Hutchinson & Anor* [1990] 2 All ER 836 dealt with the severability not of planning conditions but of a by-law, parts of which
C exceeded the powers conferred by the empowering statute. We accept and adopt the statement in *Administrative Law* by Sir William Wade (6th Ed) p 338 reading as follows:

> An administrative act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some
D direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing.

The attack here was only against the second condition. It is severable from the rest of the said planning permission. But, merely quashing it will not
E answer the needs of justice in this case. Section 24(4) of the Act requires a planning permission extended under s 24(3) to remain valid for 12 months from the date of the extension thereof. In our view, the date of the extension is the date on which the permission was extended, and not the date on which previous permission lapsed. Therefore, the respondent also did wrong in making a retrospective order instead of extending the planning
F permission from 20 July 1993 to 19 July 1994. Article 8 of the Schedule to the Judicature Act provides us with the following additional power:

> 8 Time
>
> Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor
G be not made until the the expiration of the time prescribed.
>
> Provided that this provision shall be without prejudice to any written law relation to limitation.

We must do what the respondent ought to have done if it was fair. For all
H the reasons we have heretofore given on each of the issues raised before us, we now allow this appeal. The decision of the judge in the court below is set aside. We hold that the respondent committed an error of law in imposing the second condition on 20 July 1993, and in failing to abrogate it on 20 September 1993. Accordingly we make an order in terms of the first prayer of the appellant's substantive motion dated 4 March 1994.

I We further order that the said planning permission granted on 6 September 1991 without the second condition in the respondent's letter

dated 30 July 1993 (ie the words, '(ii) Menyediakan 30% kos rendah atas harga RM25,000 seunit') be and is hereby extended for one year from the date of the service on the respondent of the order extracted pursuant to this judgment.

Finally, we order that the appellant's deposit for security for costs be returned to the appellant and that the costs of this appeal and all costs incurred in the court below be taxed and paid to the appellant by the respondent.

This has been perhaps one of the most complex appeals which we have had to deal with since this court was constituted. We wish to record here our indebtness to all the counsels and solicitors on record for the meticulous way they have assisted us in our deliberations.

Order accordingly.

Reported by Isabel Liong